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# HILARY TERM

## 14 GEORGE III. *B. R.* 1774.

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### LEE *versus* GANSEL.

*Tuesday, 25th Jan.*

THIS came before the court upon a rule to shew cause why the defendant should not be discharged out of the custody of the Warden of the *Fleet*; upon the ground of his having been illegally arrested; that is, "that the Officer broke "into the apartment of the house where he *lodged*," and which he had rented by the year, for the space of eight and twenty years before. The breaking open the door was positively sworn to on the part of the defendant, and as positively denied by the officer; who swore, that the door was open, and that having got his thigh in, a struggle ensued, in which, after a time, he prevailed, and then arrested the defendant. The entrance of the officer into the house was at the *outer* door, and was admitted on all hands to have been peaceable and legal.

A bailiff, in execution of *mesne* process, may break open the door of a *lodger's* apartment, having first gained peaceable entrance at the outer door of the house.

Mr. *Wallace*, Mr. *Bearcroft*, Mr. *T. Cowper*, and Mr. *Buller* shewed cause,

*First*, It is necessary upon an application of this kind, for the defendant to make out a clear case, and to entitle himself to the discharge he claims beyond all controversy or doubt. But here, the evidence is so contradictory as to leave him no case in point of fact; and if it did, the law is against him; which introduces the *second* and the principal question in the cause, "Whether "this lodging was the *dwelling-house* of the defendant, or "not?"

The cases upon burglary are material to the discussion of this question.

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"Law." If ſo, the officer had no right to break open this apartment in execution of meſne proceſs.

As to the *abuſe* of the proceſs being no ground for diſcharging the Defendant, it was anſwered, that in all caſes of privilege, the party arreſted is not left to ſeek his remedy by *action*; but the court does that which is the ſubſtantial Juſtice of the caſe, and places the Party in the ſame ſituation as if there had been no abuſe, or irregularity in the proceſs; and *ex parte Wilſon*, 1 *Atkyns* 152. was cited: *Wilſon* becoming bankrupt, a commiſſion iſſued; after which he was arreſted at the ſuit of the petitioning creditor; and being in cuſtody, was charged with another action at the ſuit of one *Waſs*. Upon petition to the Chancellor to be diſcharged out of cuſtody upon both actions, Lord *Hardwicke* ſaid, "Even at law where there is an irregular arreſt, and an "advantage is taken of the irregularity to charge the party in "cuſtody at the ſuit of another perſon, the court of law will "diſcharge him from both: and ordered the bankrupt to be "diſcharged accordingly."

Lord MANSFIELD ſaid, he had not much doubt at preſent, but it might be proper to look into the caſes, and alſo into ſome that had not been cited. *Curia adviſare vult.*

Afterwards, on *Thurſday* 27th *January* 1774, Lord *Mansfield* delivered the opinion of the court as follows:

This is an application on the part of General *Ganſel* to be diſcharged out of cuſtody on the following ground. That the proceſs iſſued againſt him by this court has been abuſed, and his perſon illegally arreſted; for that the officer *broke open* the *door* of his apartment which by law he could not do: therefore the court ought to diſcharge him, and put him in the ſame condition as before the arreſt.

To this charge *three* defences are ſet up on the part of the plaintiff in the action and of the officer complained againſt. The *firſt* is, that in fact the door was *not* broken open; but was previouſly *open*: and the officer having got part of his body, that is to ſay, his thigh in, after a ſtruggle to get in the reſt, in which he prevailed, arreſted the defendant. The *ſecond*, which goes to a denial of the whole ground of the application, is this; "That the *door* which was broken open, the officer had a right to "break open, due notice having been announced, and a refuſal "given." The *third* is, that ſuppoſing Mr. *Ganſel* founded in his application, as to the mode of the arreſt being illegal; yet his

his remedy is by action of *treſpaſs* for breaking open the door, or by the more ſummary mode of *attachment* againſt the officer; nevertheleſs, that the ſuppoſed treſpaſs upon his perſon is legal, for that the officer had a right to arreſt him. 1774. LEE verſus GANSEL.

Theſe are the three defences; and as to the *firſt*, there is ſo great a contrariety of evidence, that there muſt be falſe ſwearing. I doubt therefore where the truth lies: and ſuppoſing the fact contended for on the part of the plaintiff in the action to be true, I doubt as to the conſequence: that is, if an actual breaking open of the door were illegal, I doubt as to the law, where a door being *partly* open is *ſhut* by the perſon who is within, againſt the officer who is ſtruggling to get entrance. I doubt both as to the fact and the conſequence; and therefore lay that entirely out of the caſe.

The *ſecond* ground of defence and which makes the next queſtion in this caſe is, Whether *this* door might be *lawfully broken* open in execution of meſne proceſs? And as to that, the caſe is this. Mr. *Mayo* was *owner* of this houſe, in which General *Ganſel* had at the time in queſtion, and for a long time before, taken the firſt floor which conſiſted of two rooms, each of which had a door that opened upon the ſtaircaſe; he had likewiſe up two pair of ſtairs, two rooms, each of which had a door that opened in the ſame manner: he had the uſe of the kitchen beſides, and he rented theſe ſeveral apartments as a *lodger* from *year* to *year*, though that circumſtance makes no difference. Mr. *Mayo lived* in the houſe; and, which is the *material* part of the caſe, there is but *one outer door* to the houſe; at which Mr. *Mayo* enters to go to his apartment, and Mr. *Ganſel* to go to his. This is a fact concerning which there is no controverſy. Mr. *Ganſel* was up two pair of ſtairs in his bed-chamber, and as he ſays, the door was locked; and that after notice the officers broke it open; though nothing turns upon the notice or mode of breaking. The queſtion is, "Whether by law this door could "be broken open.

I ſhould firſt ſtate however, that the *outer* door of the *houſe* was *open*, and that the officers entered there legally. The queſtion therefore turns upon the ſubſequent breaking open of the bed-chamber door.

The books talk of the *privilege* of a *manſion-houſe* and of the privilege of the *door* of it, which cannot be broken open. The whole queſtion will therefore turn upon the *extent* of that

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which is called *privilege*. Now this rule of privilege, ariſing from a found maxim of *policy*, is no privilege of a *debtor* properly ſpeaking who abſconds from juſtice in avoidance of legal proceſs; but is annexed to the *houſe* and *door* (to which door I forbear at preſent to give any particular epithet) for the *protection* of a man and his family. It is therefore by conſequence only, that the privilege is a protection to ſuch a perſon, and not for his own ſake. The found maxim of policy is this, "*that a greater evil* "*ſhould be avoided for a leſs, and that a leſs good ſhould give way* "*to a greater.*" The *outer* door therefore or window of a man's houſe, ſays the law, ſhall *not* be *broken* open by proceſs. This has been long and well underſtood. The ground of it is this; that otherwiſe the conſequences would be fatal: for it would leave the family within, naked and expoſed to thieves and robbers. It is much better therefore, ſays the law, that you ſhould wait for another opportunity, than do an act of violence, which may probably be attended with ſuch dangerous conſequences. But as this is a maxim of law in reſpect of political juſtice, and makes no part of the privilege of a debtor himſelf, it is to be taken *ſtrictly*, and not to be extended by any equitable analogous interpretation.

The oldeſt caſe to be found in the books that takes notice of this privilege and warrants it, and upon which authority it was allowed at all, is a caſe in the year-book 18 *Ed.* 4. *page* 4. *pl.* 19. "There, an action of treſpaſs was brought for *breaking* "the *outer* door in execution of a *fieri facias*. The court held, "that treſpaſs would lie, for the officer ſhall *not break* open an "*outer* door to execute his proceſs: but when the officer had "ſo got in, he *broke* open a *trunk*, and took out the goods that "were in it; in reſpect of which they held, that treſpaſs would "not lie; for he had a right to break the trunk, and take the "goods." I quote this caſe not to imply that I ſhould perhaps have been of the ſame opinion myſelf in a caſe of the firſt impreſſion; but to ſhew, that the rule of privilege is taken moſt *rigidly*. Afterwards, in *Semaine*'s caſe, 5 *Co. Mich.* 2 *Jac. page* 93. the ſame ſtrict doctrine was held, namely, "that "breaking open the *outer* door was a treſpaſs, but that taking "away the goods was lawful." In *Yelverton, Mich.* 44. *El.* 29. which was the ſame caſe, *Popham* doubted whether *even* the *outer* door was privileged, becauſe it would be a hindrance to juſtice; but afterwards, in *Mich.* 2 *Jac.* 5 *Co.* 92. *b.* 93. *a.*

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the whole court held, "that the *outer* door ought not to be "*broken open*"; and grounded their opinion upon the ſingle authority of 18 *Ed.* 4. *p.* 4. *pl.* 19. before quoted. You ſee from hence with what *rigour* the privilege has been conſtrued in the oldeſt caſes.

But no caſe or dictum has been cited at the bar, nor indeed did there ever exiſt a caſe, which intimated a doubt whether an *inner* door might *not* be *broken* open. In *Hob.* 62. and 263. among other outrageous things the bailiff broke open a chamber door, having entered legally at the outer door; but ſuch breaking was held lawful, the firſt entrance at the outer door which was open, having been legal: and yet the latter was a very harſh caſe, for they broke in when the man and his wife were in bed, and behaved with great violence and outrage. But I lay ſtreſs on this to ſhew how *ſtrictly* the privilege has been underſtood, when the *outer* door or *window* is ſecure, and when the entrance has not been forcible through either of them, ſo as to lay open the houſe and its inhabitants to inſult and violence from without; but on the contrary has been quiet and peaceable. In addition to theſe authorities, I recollect a note of a caſe lately determined, which ſays, "an *inner* door has *no* protection at all." It was the caſe of *Aſſley* and *Pindar*, and was heard in the year 1760, *Mich.* 1 *Geo.* 3. There, all the other charges againſt the bailiffs were anſwered, except breaking the *inner* door, which was accompanied with ſuch violence, that the door fell, and the officer with it into the room: but all the court were of opinion, that the officers having lawfully entered at the *outer* door, might break open the *inner* to execute the duty of their office. Beſides theſe caſes, and in conformity to the principles upon which they have gone, I ſhall cite a very ſenſible and material diſtinction from a book in my hands, which is *Foſter* C. L. title *Homicide*, *c.* 8. *ſect.* 20. which is this. "The rule that every man's houſe "is his caſtle, when applied to arreſts on legal proceſs, has been "carried as far as political juſtice will warrant, and perhaps "further than in the ſcale of reaſon and ſound policy they will "warrant. But in caſes of life we muſt adhere to rules well "known and eſtabliſhed. But this rule is not one of thoſe "that will admit of any *extenſion*. It muſt, therefore, as I have "before hinted, be confined to the breach of windows and of "outer doors intended for the ſecurity of the houſe againſt "perſons from without, endeavouring to break in."

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This brings the queſtion to this point, "Whether this was "the *outer* door to the *houſe* of the defendant? for the law, we "have ſeen, does not privilege an *inner* door."

It has been ſaid, that this lodging is an houſe, and has an outer door; and it has been likened to the caſe of chambers in the inns of court and in colleges, which have each an outer door that opens, like the door in queſtion, upon the common ſtaircaſe, and which, in caſes of burglary, have been held to be the houſes of the reſpective occupiers. The fact is, that from the nature of thoſe buildings, they are *all* as *ſeveral* houſes, and have *ſeparate outer* doors which are the extremity of obſtruction; becauſe the *ſtaircaſe* is no outer door. Again, they are enjoyed as ſeparate property: In *Lincoln's-Inn*, they have ſeparate eſtates of inheritance; in the others, they have eſtates for life, and in colleges as long as they reſide. So, if that which was one houſe originally comes to be divided into ſeparate tenements, and there is a diſtinct outer door to each, they will be ſeparate houſes, as *Newcaſtle-houſe*.

The diſtinction therefore can only be between ſeveral outer doors, and one outer door.

How far Lord *Hale* meant to carry his opinion in the paſſage that has been cited, it is difficult to ſay. Where a burglary is committed in the apartments of one who lodges in a houſe, the circumſtance of the *owner's living* in it, or his occupying only a ſhop or cellar in which he does *not ſleep*, makes a very material difference as to the form of the indictment; for in the latter caſe the *lodger* has the *outer* door entirely to himſelf; and the burglary in ſuch caſe, muſt be laid to be in the houſe of the lodger; but it is otherwiſe in the former caſe, for there it muſt be laid to be in the houſe of the owner. And notwithſtanding the greatneſs of Lord *Hale*'s authority, it appears not clearly expreſſed, or perhaps not fully conſidered; at all events, we muſt not determine upon a ſingle and uncertain *dictum*, againſt the many late and poſitive caſes, grounded on the oldeſt deciſions and moſt eſtabliſhed principles.

But, if there were nothing more to confute the doctrine which has exhauſted ſo much learning and ingenuity in ſupport of it, the abſurdity of the propoſition would of itſelf be ſufficient. And it is this, that whereas the *greateſt houſe* in *London* has but *one* outer door; this gentleman having *four rooms* in one houſe, ſhall have *four* diſtinct *outer* doors. If any of them could be

be ſaid to be an outer door, it muſt be the door of the lower rooms; but the truth is, they are *all inner* doors. 1774.

Therefore we are all moſt clearly of opinion, that by law, *this* door was *legally broken* open. LEE *verſus* GANSEL.

With regard to the point of relief, in caſe the arreſt had been illegal, I give no opinion; though I think it would depend upon the behaviour of the party applying. It is poſſible a perſon might come to aſk that relief, under circumſtances of ſuch groſs miſbehaviour as might induce the court to refuſe it. Though the court, where a perſon is arreſted who has been attending its proceſs, will interpoſe, not only by puniſhing the officer, but by diſcharging the priſoner out of cuſtody; yet caſes of this ſort are always matters of diſcretion with the court under their particular circumſtances.—But it is not neceſſary here to enter into that point; as we are all clearly of opinion that General *Ganſel* was legally arreſted; and, therefore, ought not to be diſcharged.

*Per cur.* Rule diſcharged.

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## MOORE *verſus* MAGRATH.

*Tueſday, Feb.* 1ſt.

ERROR upon a judgment of *B. R.* in *Ireland* in an ejectment brought for certain lands in the county of *Roſcommon*: Plea, not guilty. Upon the trial the jury found a ſpecial verdict in ſubſtance as follows:

" That *Michael Moore* being ſeiſed in fee of an undivided " moiety of certain lands in the county of *Mayo*, and alſo of an " undivided moiety of certain other lands in *King's County*, both " in right of his wife; and being likewiſe ſeiſed of certain " lands, *&c.* in the county of *Roſcommon*, for which the ejectment was brought, and of other lands in the counties of *Clare* " and *Galway*; all which latter were his paternal eſtate, exe- " cuted a deed, bearing date the 2d of *October* 1742, as fol- " lows:

" This indenture tripartite, *&c.* between *Michael Moore* of " *Cloncoran* in the county of *Roſcommon* Eſq; of the one part, " and *Robert Dillon* of, *&c.* of the 2d part, and *Roſs Mahon*, of, " *&c.* of the 3d part. Witneſſeth, that the ſaid *Michael Moore*,

One by deed in *conſideration* of *love* and *affection* to his *name, blood, &c.* and for *ſettling* the one *undivided moieties* of his manors, lands, *&c.* thereinafter mentioned *grants* the ſaid *undivided moieties*, particularly deſcribing them, *together with all other his lands, tenements, and hereditaments in the kingdom of* Ireland: *Habendum* the ſaid *undivided moieties* before granted, *together with all other his eſtate in the kingdom of Ireland*, to *A.* to the ſeveral *uſes* thereinafter *declared*, and *for no other uſe whatſoever*; and then declares the *uſes* of the undivided *moieties only*. *Per Cur.* held that the grantor did not intend to paſs any lands but the undivided moieties. 2dly, Suppoſing the ſweeping clauſe did extend to any *other* lands, yet *no uſe* being declared of them, they deſcend to the heir at law.

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" for and in *conſideration* of the natural *love* and *affection* which " he hath to his *name*, *blood*, and *family* and for ſettling and ſe- " curing the *one undivided moieties* of the manors, caſtles, towns, " lands, tenements, and hereditaments hereinafter mentioned, " in his name, blood, and family, ſubject to the payment of his " debts, &c. and in conſideration of five ſhillings to him by the " ſaid *Robert Dillon* in hand paid, &c. he the ſaid *Michael* " *Moore* HATH granted, &c. and by theſe preſents DOTH " grant, &c. the *one undivided moieties* of all that and thoſe " the manors, caſtles, towns, lands, tenements, and heredita- " ments following, that is to ſay,—Here the deed deſcribes every part and parcel of the undivided moiety in the county of *Mayo*. — " As alſo all that," — Here the deed as minutely deſcribes the undivided moiety in *King's County*: and proceeds as follows. " Together with *all other* the ſaid *Michael Moore's* " *lands*, tenements and hereditaments *in the kingdom of Ireland*. " To HAVE and to HOLD the ſaid undivided moieties of the ſaid " manors, caſtles, towns, lands, tenements and premiſes, herein " before granted, or intended to be granted, with their and every " of their rights, members and appurtenances, together with *all* " *other* the ſaid *Michael Moore's eſtate* in the kingdom of *Ireland*, " unto the ſaid *Robert Dillon* and his heirs, to the ſeveral *uſes*, " intents and purpoſes *herein after declared*, limited, and appoint- " ed, and to and for *no other uſe*, intent or purpoſe whatſoever; " that is to ſay, as for and concerning the one undivided moiety " of the ſaid lands and premiſſes lying and being in the county of " *Mayo*, to the uſe and behoof of the ſaid *Michael Moore* and " his heirs for the payment of debts, remainder to himſelf in " tail, remainder to *Garret Moore* for life, remainder to the " firſt and other ſons of *Garret Moore* in ſtrict ſettlement, re- " mainder to fourteen perſons of the name of *Moore*, his brothers " and couſins ſucceſſively in tail-male remainder to his own " right heirs." The like uſes are repeated and declared reſpecting the undivided moiety in *King's County*, except that a term of 500 years is given to *Roſs Mahon* for the purpoſe of ſecuring a jointure of 200*l.* a year, to *Francis Moore* his wife; and to raiſe the ſum of 1500*l.* for his daughters portions.

" That on the 25th of *March* 1743, *Michael Moore* died leaving " *Mary Moore*, now *Mary Concannon*, one of the leſſors of the " plaintiff in ejectment, and *Francis Moore*, his co-heirs at law.

" That in *Trinity* term 1755, *Garrett* levied a fine and ſuffered " a recovery of the *Roſcommon* eſtate to himſelf in fee; and died

" on

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" on the 4th of *February* 1767, without iſſue: Upon his " death, *Edmond Moore* entered; and by leaſe and releaſe, 28th " and 29th of *June* 1768, conveyed the premiſſes to *Luke Dillon*, " to the uſe of himſelf in tail-male; remainder to *John Moore* " for life, remainder to his firſt and other ſons in ſtrict ſettle- " ment. That *John* being in the *French* ſervice, was by " decree in the *Exchequer*, held to be diſabled under ſtatute " 19 *Geo.* 2. to hold the ſaid eſtate, and his intereſt was decreed " to *William Biggen* the firſt informer, who aſſigned the ſame " to *Garret* the defendant in ejectment, who entered on the 12th " of *April* 1771."

Upon this ſpecial verdict, the court of *King's Bench* in *Ireland* gave judgment for the plaintiff; which was entered upon the record as follows: " Therefore, it is conſidered that the ſaid " *John Magrath* do recover againſt the ſaid *Garret Moore* his " ſaid ſeveral terms yet, *&c.* in the ſaid demiſed premiſſes," *&c.*

For the plaintiff in error, *Obj.* 1ſt. It is not ſtated upon the record that the defendant is *guilty:* therefore there is no verdict, and conſequently there can be no judgment.—*Reſp.* In ſubſtance, the defendant is found guilty: for it is implied, in ſaying, " that the plaintiff ſhall recover the pre- " miſſes:" the judgment therefore is merely informal, and may be amended.

*Obj.* 2dly. The plaintiff has no right to recover; for it was clearly the intention of the donor to include, under the general ſweeping clauſe in the deed, the whole of his eſtates in *Ireland* not before diſpoſed of, and to ſettle them to the ſame uſes as he had declared reſpecting the two undivided moieties.—*Reſp.* His intention was only to ſettle the undivided moieties, and the preamble takes notice of nothing elſe; therefore, if the intention is to govern, the lands in queſtion did not paſs by the ſweeping clauſe. But ſuppoſing they did, no *uſe* is declared of them: Therefore they reſult to the donor; and conſequently the leſſors of the plaintiff are well entitled. *Strong* verſus *Teat*, 2 *Bur.* 912.

Lord *Mansfield.* I am very clear. It might be plainer with the deed: but, without ſeeing the deed, it is plain enough.

This gentleman was ſeiſed of an eſtate in right of his wife, which conſiſted of an undivided moiety of lands in the county of *Mayo*, and of another undivided moiety of lands in *King's County:* He was likewiſe ſeiſed of a paternal eſtate in three other counties;

and

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1ſt, Whether upon the true conſtruction of this deed the donor has ſettled his paternal eſtate? If he has, that has conveyed it to Mr. *Dillon*.

2dly, Whether he has declared any uſe of it? If he has not, it muſt reſult to himſelf: for the declaration being that the eſtate ſhould be to ſuch uſes as were *declared*, and *no other*, unleſs he has declared ſome uſe, there is no diſpoſal of it: and in order to diſinherit an heir at law, a man muſt give his eſtate to ſomebody elſe.

With reſpect to the firſt point, it ſtrikes me very ſtrongly, that being ſeiſed of a paternal eſtate, and an eſtate in right of his wife, it was reaſonable he ſhould not ſettle both; and I believe there was ſome private motive for his ſettling the one in preference to the other; but not ſeeing the deed we are at a loſs.

I am of opinion that he never had an idea of conveying any part of theſe lands by the deed of 1742, though, by the blunder of the drawer, he may have uſed words that might extend to them.

The deed begins with the preamble uſual in all ſettlements; that is, by reciting what it is that the grantor intends to do; and that, like the preamble to an act of parliament, is the *key* to what comes afterwards. Now the preamble does not mention a word of his paternal eſtate: whereas, if it had been his intention to ſettle that, would he not have added after the word "moieties" words to the effect following, and alſo *all* other his lands, &c. in the kingdom of *Ireland*? It is ſcarcely poſſible, if he had an idea of including his paternal eſtate in the ſettlement, that he ſhould recite his intention of ſettling the one, and be totally ſilent as to the other. Again the deed goes on, with much tautology, to deſcribe every part of each of the undivided moieties, moſt minutely and particularly: Would he do that, with an intention of paſſing his *paternal* eſtate by the ſame deed, and make no deſcription of it at all? It is very common to put in a ſweeping clauſe; and the uſe and object of it in general is, to guard againſt any accidental omiſſion: but in ſuch caſes, it is meant to refer to eſtates or things of the ſame nature and deſcription with thoſe that have been already mentioned. I am therefore of

opinion from the words of the preamble, that the donor did not intend to include his paternal eſtate: and it is more than probable that the drawer by miſtake omitted inſerting the two counties before the words "in the kingdom of *Ireland*."

1774. MOORE *verſus* MAGRATH.

The ſecond queſtion is, "Whether any uſe is declared of the "ſweeping clauſe?"

Now though he has minutely deſcribed the uſes of the undivided moieties, he certainly has not declared any one uſe or limitation of the ſweeping clauſe. This circumſtance alone is a ſtrong argument in favour of the conſtruction which the court inclines to upon the firſt point. But nothing can be ſo clear, as that this eſtate muſt reſult to the heir, ſince no uſe is declared of it.

Mr. Juſtice *Aſton*, M. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred.

*Per Cur.* judgment affirmed.

## REX *verſus* GENGE.

*Saturday, Feb. 5th.*

One who is a reſiant within a *private leet*, within the *hundred*, is not therefore exempt from ſerving the office of *conſtable* of the *hundred*: And a *cuſtom* to elect ſuch a one conſtable is *good*.

THE defendant was indicted, for that he at a court leet, holden in and for the hundred of *Whitchurch* in the county of *Dorſet*, was, by the jury of the court, elected conſtable of the hundred; that he was a reſiant and liable to ſerve the office, and had notice of his election; that the ſteward certified in writing to all juſtices, *&c.* that the defendant was elected conſtable; but was not preſent nor was ſworn; and that the defendant afterwards was ſummoned to appear before a juſtice of peace to take the oath of office, but he had refuſed to be ſworn into, or to execute the office. The defendant pleaded the general iſſue; and the indictment was tried at the laſt aſſizes at *Dorcheſter*, when the jury found a ſpecial verdict, ſtating in ſubſtance as follows:

'That *from time whereof the memory of man was not to the contrary*, there had been and was a *court leet*, within and for the *hundred* of *Whitchurch*. That at ſuch court leet, two perſons being *reſiants* within the hundred, from time whereof the memory of man is not to the contrary, have, by the jury ſworn at ſuch court leet, been annually choſen to ſerve the office of *conſtables* of the ſaid *hundred*.—That the manor of *Wootton Abbots* extends into and comprehends *two tythings* and no more; one of which tythings, *from time whereof the memory of man is not to the contrary*, hath been and is within the hundred

1774. dred of *Whitchurch*; the other within and parcel of another hundred.—That, from time whereof the memory of man is not to the contrary, there hath been and is a court leet within the manor of *Wootton Abbots*, at which court, the reſiants within the ſaid two tythings from time whereof, &c. have done ſuit and ſervice, and have been choſen tything-men of the ſaid tythings. That there have been, *time out of mind*, and yet are eighteen other tythings, within the ſaid hundred; and the reſiants of thoſe tythings, *from time whereof*, &c. have done ſuit and ſervice at the *court leet* of the *hundred*; and ſerved as jurymen there, and been *eligible*, *elected*, and *ſerved* as *conſtables* of the *hundred*: And that for twelve of the ſaid eighteen tythings, reſiants therein from time whereof, &c. have annually been choſen in the court leet of the hundred to be tything-men.—That by *ancient cuſtom* the *reſiants* of the *tything* of *Wootton Abbots* have been *choſen* and *ſerved* as jurymen in the leet of the hundred; and have been *elected* by the jury of the *court-leet* of the hundred to be *conſtables* of the *hundred*, and have by ſuch *ancient cuſtom ſerved* as ſuch. That the defendant at a court leet holden, &c. for the hundred, was elected conſtable of the *hundred*, but not being preſent, the ſteward made his certificate, &c. &c. *prout* the indictment.' The queſtion, for the opinion of the court upon this ſpecial verdict, was, whether the defendant was exempt from ſerving the office of *conſtable* of the *hundred* of *Whitchurch* by reaſon of his then being a *reſiant*, and an inhabitant of and within the *tything* of *Wootton Abbots*, being a private leet within the leet of the hundred of *Whitchurch*?

Rex verſus Bines.

This caſe was firſt argued in laſt *Michaelmas* term, by Mr. Serjeant *Davy* for the proſecutor, and Mr. Serjeant *Burland* for the defendant: And again this term, by Mr. *Dunning* for the proſecutor, and Mr. Serjeant *Glynn* for the defendant.

For the proſecutor it was argued, that the defendant was not exempt. The offices of tythingman and conſtable are not incompatible; becauſe the duty of both is the ſame, only the former is circumſcribed within narrower limits; and in this caſe, the one juriſdiction is within the other. As to the objection that no man is obliged to do ſuit at two leets, the obligation on the defendant to do ſuit as tythingman one day in a year, might be an excuſe for his not attending the hundred court that day; but it would be ſingular to ſay, that the obligation of attending elſewhere, *one* day in a year, ſhould exempt from ſerving the office of conſtable which is *annual* and *perennial*. But

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1774.

Rex verſus Green.

the office of conſtable is no ſuit at all, therefore he is liable.— Tenants in ancient demeſne are exempt from *ſuit*, from ſerving the office of jurymen or attending the court leet, and yet are liable to ſerve the office of conſtable. 2 *Show.* 75. 1 *Ventr.* 344. *F. N. B.* 161. 376.

In 3 *Keb.* 230. *Rex* verſus *King*, Lord *Hale* ſays "regularly "a man who owes ſuit to the leet, owes none to the hundred; "but chuſing conſtables is no article of the leet, and therefore "the hundred ſhall not be excluded as to this." In *Freeman*, 348, 349. S. C. Lord *Hale* is made to uſe the ſame expreſſion; "that "the conſtable of an hundred is an article that the inferior leet "cannot meddle in." But the caſe of the *Queen* verſus *Jennings*, 11 *Mod.* 215. is in point. There upon a ſpecial verdict the queſtion was, whether the defendant, being an inhabitant of a particular leet, was excuſed from ſerving as high conſtable of the hundred? and the court held, he was *not* excuſed. In 3 *Keb.* 230. Lord *Hale* adds, "that by *cuſtom* a man who owes ſuit to the leet "may likewiſe owe ſuit to the hundred:" Here ſuch a cuſtom is found. Therefore the defendant is liable.

For the defendant it was inſiſted, *contra*, that he was exempt. 1. Formerly all reſiants were obliged to attend the leet of the hundred: but that being found inconvenient, by ſending huſbandmen to a diſtance from their home, the king granted inferior leets; and from that time it was held, that no man ſhould be bound to do ſuit and ſervice at *two* different courts. Lord *Coke's Com.* on *Magna Charta*. *c.* 35. 2 *Inſt.* 71. and on ſtat. *Marlebridge*, *c.* 10. 2 *Inſt.* 122. "If a man hath a houſe "within two leets, he ſhall only do ſuit where his perſon is "commorant; and where his bed is, there he ſhall be ſaid to be "commorant." So in *Dalton's Sheriff*, 402, 403. and 2 *Hawk. Pl. C. c.* 11. *ſect.* 3. "no man is obliged to attend two leets, "at the ſame time, in the ſame reſpect." 2. If he does not owe ſuit and ſervice to the ſuperior leet, he is not compellable to take upon him any of the offices of the ſuperior leet. As to the caſe of *Rex* verſus *King*, 3 *Keb.* 230. and *Freeman* (*a*), 348, 349. they are books of no authority, nor is the caſe to be found in any contemporary reporter. They make Lord *Hale* talk unintelligibly with reſpect to the difference between borough and upland towns; and even contradict himſelf in ſaying, "that "conſtables were before the ſtatute;" whereas in 2 *Pl. Cor.* 96.

(*a*) Lord *Mansfield* ſaid, that ſome of the caſes in *Freeman* were very well reported.

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1774. Rex verſus Gaver.

he expreſsly ſays, "they were introduced by the ſtatute of *Wind-*
"*ſor.*"—11 *Mod.* is likewiſe a book of no authority: And it is no reaſon, becauſe the Lord, as it is there ſaid, may fit in the leet, that a private man may be choſen conſtable. 3dly. As to the cuſtom, no ſuch cuſtom is found, nor was meant to be found, as appears from the different expreſſions uſed in the verdict. For, with reſpect to the *manor*, the cuſtom is found to be *time out of mind*, and the jury find it in all its parts. But with reſpect to the *tything* of *Wootton Abbots*, they only find that by *ancient cuſtom* the reſiants have been choſen, and by ſuch ancient cuſtom have ſerved the office of conſtable of the hundred; but they do not find any obligation on them, or that any one was ever compelled to ſerve. Therefore it is a finding of evidence, not of facts: and if the finding be imperfect, it ought to be tried again.

Lord *Mansfield*. There is no authority or *dictum* whatſoever, by which it is held, that a reſiant within a leet, within the hundred, is excuſed from ſerving the office of conſtable of the hundred. Again, where there is a cuſtom of the ſort ſtated in this ſpecial verdict, there is no authority which ſays that ſuch a cuſtom is not good. On the other hand, there is an expreſs authority of a caſe of *Rex* verſus *King*, reported in two books, each of which ſtates the caſe in the ſame way. It is objected, however, that theſe are books of no authority: but if both the reporters were the worſt that ever reported, if ſubſtantially they report a caſe in the ſame way, it is demonſtration of the truth of what they report, or they could not agree. Here they agree in Lord Chief Juſtice *Hale*'s ſaying, "that the choice of a conſtable is no article of the buſineſs of a "leet," and that it is no excuſe that the party is within the juriſdiction of another leet. Another authority, in 11 *Mod.* 215, which is very particular and ſtrong, lays down the ſame doctrine. And further, Lord *Hale*, according to 3 *Keble* 230, adds, that if generally excuſed, yet by *cuſtom* one may be liable. Here a *cuſtom* is found by the verdict: But an objection is taken to the manner of finding it. I ſhould have thought, between theſe parties, the merits would have been tried without any cavil. The caſe comes before us upon a *ſpecial verdict*, which ſtates, "that there has been a court leet *from time whereof*, *&c.* and "that two perſons from time whereof, *&c.* have been choſen, "*&c.*" and therefore, when it afterwards ſays by "*ancient cuſtom*," it muſt mean ſuch cuſtom as beforementioned, which is "*imme-*
"*morial.*"

*memorial.*" I think no man can doubt of what the jury meant, and I think the words they have uſed convey their meaning. Therefore I am of opinion that the cuſtom is ſufficiently found. 1774. R[illegible] G[illegible]

*Aſton* Juſtice. Ancient cuſtom in this caſe is immemorial cuſtom; and I agree with my lord in thinking that ſuch was the meaning of the jury. As to the party being exempt from ſerving one office, on account of his obligation to diſcharge the other, it is only meant that he is not liable to do it in the ſame manner, at the ſame time, in the ſame reſpect. But the office of conſtable of the hundred, according to Lord *Hale*, is not an article within the juriſdiction of the leet.—He obſerved that the doctrine in *Rex* verſus *Betteſworth*, 2 *Show.* 75. was well warranted.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred. Judgment for the king.

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## JONES *verſus* RANDALL.

*Monday, Feb.* 7th, 1774.

In an action upon a wager, whether a decree of the court of *Chancery* would be reverſed on appeal to the Houſe of Lords, proof of the decree and reverſal is ſufficient without ſhewing the previous proceedings below.—A *copy* of the judgment of reverſal is admiſſible, and need not be ſtamped.

THIS was an action upon a wager, whether a decree of the court of *Chancery* would or would not be reverſed in the houſe of lords? Verdict for the plaintiff, damages fifty guineas.

Upon a rule to ſhew cauſe, why there ſhould not be a new trial in this caſe, three objections were made to the ſufficiency of the evidence given at the trial. 1ſt. That a *copy* of the reverſal only, and not the minute book itſelf, was produced. 2dly. If ſuch copy was admiſſible, yet it ought to have been upon *ſtamps*. 3dly. That the *previous* proceedings ought to have been ſhewn, whereas the *decree only* was produced.

Lord *Mansfield*. The minutes of the judgment are the ſolemn judgment itſelf: not a word is added upon the journals: and a *copy* of them may certainly be read in evidence; for the inconvenience would be endleſs, if the journals of the houſe of lords were to be carried all over the kingdom. As to ſuch copy being upon *ſtamps*, it was decided in Queen *Anne*'s time by the opinion of all the judges of *England*, that copies of the proceedings of parliament need *not* be *ſtamped*. Formerly a doubt was entertained, whether the minutes of the *Houſe* of *Commons* were admiſſible, becauſe it is *not* a court of *record*; but the journals of the *Houſe* of *Lords* have always been admitted, even in criminal caſes.

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JONES *verſus* RANDALL.

*Aſton* Juſtice. They were ſo in *Rex* verſus *Oates*. *State trials*, *Vol.* iv. *p.* 44. *et vide page* 38.—As to the previous proceedings, the court held there was no neceſſity to ſhew them; for the ſingle fact in iſſue at the trial was, "whether the decree of the court "of *Chancery* was reverſed," not what the previous proceedings were: and therefore proof of the *decree*, and of its being *reverſed*, was clearly ſufficient. The rule was accordingly diſcharged.

The next day, Mr. *Dunning* moved in arreſt of judgment upon two grounds.

*Firſt*, that the event was not contingent, but *certain*: *Secondly*, that the contract was *illegal* upon the face of it, being *contra bonos mores*. *Vide infra*, 37.

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*Wedneſday, Feb.* 9th.

## ROWLAND *verſus* VEALE, and others.

In Juſtification by proceſs out of an inferior court, the plea ſtated "that the "plaintiff "below levied his "plaint, in "a plea of "treſpaſs "on the "caſe; for "a cauſe of "action "ariſing "within "the juriſ- "diction "of the "court;" and held well enough, without ſetting forth the cauſe of action, or that the defendant became indebted within the juriſdiction.

THIS was an action of treſpaſs, aſſault, and falſe impriſonment. Plea as to the treſpaſs and aſſault, not guilty: And as to the impriſonment, a ſpecial juſtification.—"That "within the fee of *Trematon* in the counties of *Devon* and "*Cornwall*, there is a certain court of record holden at the "caſtle of *Trematon*, within the ſaid fee of *Trematon*, from *three* "*weeks* to *three weeks*: and that at a certain court held, &c. "the ſaid *Andrew Veale levied his certain plaint* againſt the ſaid "*Thomas Rowland*, in a certain plea of treſpaſs upon the caſe, "for a *cauſe of action* perſonal *ariſing within the juriſdiction* of "that court; and thereupon ſuch proceedings were had, &c. "that afterwards, &c. it was conſidered by the ſaid court, that "the ſaid *Andrew* ſhould recover againſt the ſaid *Thomas Row-* "*land* 14*l.* 1*s.* for his damages, &c. Upon which, &c. a "certain precept in writing iſſued, &c. directed to the bailiff of "the court of the ſaid fee, and alſo to the ſaid *Thomas Dunn* and "*Robert Barnaford* miniſters of the ſaid court, commanding "them to take the body of the ſaid *Thomas Rowland* and deliver "him to the keeper of, &c. to be by him ſafely kept, ſo that "the ſaid keeper might have his body, &c. at *the next court* to "be there held, &c. after the date of the ſaid precept, &c. "which ſaid precept, the ſaid *Andrew* delivered to the ſaid "*Thomas Dunn*, and *Robert Barnaford*, requiring them to ex- "ecute the ſame: Whereupon the ſaid *Thomas Dunn* and "*Robert Barnaford* afterwards, &c. took and arreſted the ſaid

" *Thomas Rowland*, and delivered him to the keeper, to be by " him ſecurely kept, ſo that he might have his body, *&c.* " *at the next* court, to be there held after the date of the ſaid " precept."

To this plea there was a ſpecial demurrer, which came on to be argued laſt *Michaelmas* term, when the court took time to conſider; and now Lord *Mansfield* delivered the opinion of the court as follows:

Three exceptions have been taken to the defendants plea of juſtification. The *firſt* is, that the defendants have not ſufficiently ſet out the cauſe of action, but have only ſaid that the plaintiff below, *levied his plaint*, in a plea of treſpaſs on the caſe; nor have they ſet forth that the preſent plaintiff became *indebted within the juriſdiction* of the court. *Secondly*, it is not alleged that the *precept* for taking the body was ever *returned* to the court. And *thirdly*, that the writ was void, for that a *certain day* of return was *not* ſhewn.

With reſpect to the *firſt*, " that the *plaint* is ſet out too *gene-* " *rally*", let us conſider, what a plaint in an inferior court is. In *Lilly's Practical Regiſter*, fol. 195. a plaint is in the nature of an original writ: the form is there ſaid to be thus: " *A. B.* " *queritur verſus C. D. de placito tranſgreſſionis, et ſunt plegia de* " *proſeq. ſcilicet*, John Doe *et* John Roe." Here the plaint is ſet forth as in *Lilly*.—In *Wade* verſus *Hatcher*, *Lev. Ent.* fol. 176. the plaint is ſet out thus, " *levavit quandam querelam ſuam* " *verſus defendentem de placito tranſgreſſionis ſuper caſum tali-* " *terque ſuperinde proceſſum fuit.*" This differs from that, only in alleging that the damages were aſcertained by the recovery. In 2 *Lut.* 914. the plaint is ſet out in the ſame general manner.

Formerly, the courts of *Weſtminſter-Hall* were much more ſtrict in regard to the ſetting out proceedings of inferior juriſdictions; and nothing was to be preſumed in favour of their regularity: nor was it allowable to ſet them out with a *taliter proceſſum eſt*: but theſe objections in point of form, have, of late years, been over-ruled in order to come at the real merits: And ſo it was determined in 2 *Lev.* 81. *Doe* and *Parmiter*. *Hil.* 24 & 25 *Car.* 2. The ſame doctrine is likewiſe laid down in 1 Ld. *Raymond* 80. upon the authority of 2 *Lev.* 81. though it is there ſaid, that the old books were to the contrary. But this objection as to the plaint is fully anſwered, and the law ſettled, in 2 *Mod.* 195. *Higginſon* verſus *Martin*, upon a plea

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ROWLAND *verſus* VEALE.

of juſtification to an action of treſpaſs and falſe impriſonment, ſetting forth generally "that a plaint was entered in *placito* "*tranſgreſſionis* in the court of *Warwick* with a *taliter pro-* "*ceſſum*;—exception was taken that it was not ſet forth what *kind* of treſpaſs it was; but the court held it was well enough. As to the *latter* part of this objection, "that it is not ſtated in "the plea, that the plaintiff became indebted within the juriſ- "diction," the ſame liberality is to hold. For if the cauſe of action did not ariſe within the juriſdiction, the defendant ſhould have availed himſelf of it by plea in the court below: or, if it was not alleged in the plaint below to be within the juriſdiction, it would have been bad on error, or writ of falſe judgment, and ſo he might have taken advantage of it: but as he has taken neither of theſe methods, the preſumption is, that the cauſe of action did ariſe within the juriſdiction. This very objection was taken in the caſe of *Titley* verſus *Foxall*, *Trin.* 31 *Geo.* 2. in *C. B.* and over-ruled. That was a plea of juſtification to an action of falſe impriſonment, under proceſs for a debt iſſuing out of the *Borough Court* of *Shrewſbury*; and there it was laid as here, "that the defendant levied a plaint in a plea "of treſpaſs for a cauſe of action, ariſing within the juriſdiction "of the court." *Objected*, that it did not appear that the cauſe of action aroſe within the juriſdiction, or that the defendant became indebted there. The court ſaid, it was neceſſary it ſhould appear that the cauſe of action did ariſe within the juriſdiction; but in the caſe before them it did appear as ſtrongly as poſſible; for it was ſtated, "that he levied a plaint in a cauſe of action "ariſing within the juriſdiction." So here, it is expreſsly ſet forth that the plaint was for a cauſe of action ariſing within the juriſdiction of the court.

If the cauſe of action does not ariſe within the juriſdiction, the defendant muſt avail himſelf of it by plea in the court below: or, if not alleged in the plaint below to be within the juriſdiction, it will be bad on writ of error or falſe judgment.

With regard to the *ſecond* objection, the diſtinction which has prevailed as to the neceſſity of ſtating that the writ was returned or not, is between a *capias* upon *meſne proceſs*, and a writ of execution. To a *capias* upon the former, the return of the precept muſt be ſet forth: but in the latter caſe it is unneceſſary. The caſes in point are *Doiley* verſus *Joliffe*, *Lane* 52. and *Hoe*'s caſe in 5 *Rep.* 90. where the reaſon aſſigned, why upon execution the return need not be ſet forth, is, that after execution, the plaintiff has had the effect of the ſuit. But if the *capias* in proceſs be not returned, the arreſt is *tortious*; for there the object of the writ is to enforce the appearance of the party. The caſe cited at the bar, 2 *Rol. Abr.* 563. *pl.* 18. was upon

Where it is under proceſs of *execution*, it need not be ſhewn that the precept was returned; otherwiſe in *meſne proceſs*.

*meſne*

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ROWLAND *verſus* VEALE.

*meſne proceſs.*—*Freeman* verſus *Blewitt*, 1 *Salk.* 409. was a plaint in replevin entered in the ſheriff's court in *London*, and pleaded by the defendant as ſerjeant at mace. Upon demurrer it was objected, that the precept was not returned; and the exception was allowed, becauſe the writ is a returnable proceſs, and the ſerjeant at mace a principal officer: otherwiſe, where the juſtification under a proceſs is by a ſubordinate officer.—In 2 *Mod.* 59. which I ſhall preſently cite at large, one of the objections was, that it was not alleged that the precept was returned; but the court held that the officer was not puniſhable though he did not return the writ.

The *laſt* objection that has been taken in this caſe is, that the writ is void not being returnable on a *day certain*, but generally, at the *next court*. Now it is ſtated in the preſent juſtification that this court is holden from *three weeks* to *three weeks*, and that this is an execution againſt the body, not a writ upon *meſne proceſs*. In ſupport of this objection, *Cro. Car.* 254. *Dyer* 262. *b. pl.* 33. *Cro. Jac.* 314.—2 *Bul.* 36.—1 *Mod.* 81. were cited, but all theſe are caſes upon *meſne proceſs*, imparlance, or continuance. But in *Freeman* 319. *Hil.* 1673, on a writ of falſe judgment to reverſe a recovery ſuffered in an inferior court, amongſt many exceptions, one was, that there is an imparlance *ad proximam curiam tent.* and doth not ſay *ſcil.* ſuch a day; and cited 1 *Rol. Abr. tit. Continuance*, 484. *pl.* 7. *Cro. Car.* 274. S. C.—But it was anſwered, that admitting it be error, yet all errors of that nature are ſalved by the parties appearance. In 38 *E.* 3. 2. *Brok. Contin.* 48. 2 *Crok.* 284. it is laid down 'that a miſcontinuance of a proceſs is well aided by appearance of the parties; as where one proceſs is awarded for another, or miſreturned.' The reaſon given in 2 *Bul.* 36. and *Cro. Jac.* 314. why a writ returnable at the next court generally, is not good, does not hold in the caſe of an execution; for there the ground of it was this; that otherwiſe the party may be detained forty years, before any court is held. It ought therefore to have been ſhewn for certain, when the court was to be held; though it was there alleged, that it appeared by their juriſdiction, that the court was held *de die in diem*; And yet the court were of opinion that the plea was ill.

The court was held from *three weeks* to *three weeks*, and the writ was, to have the body at the *next court*, generally: It is good; and a day certain need not be ſhewn.

But the laſt caſe in order of time has departed from this rule of ſhewing a day certain, even upon *meſne proceſs*: And that is the caſe of *Crowder* v. *Goodwin*, 2 *Mod.* 58, 59. *Mich.* 27 *Car.* 2. and was thus: In aſſault and battery and falſe impriſonment, there was a juſtification by proceſs out of an inferior

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court. Upon demurrer, ſeveral exceptions were taken to the plea; the ſecond was, that the precept was to take the plaintiff, and have him *ad proximam curiam*, which was not good, for it ſhould have been on a day certain. To this it was anſwered, that it was well ſet forth to have the plaintiff *ad proximam curiam*. The Chief Juſtice doubted, that upon this exception the plea was ill, but the three other judges held it *good*: and it was argued at the bar to be well ſet forth; for how can a return be upon a day certain, when the judge may adjourn *de die in diem*? But this caſe is much ſtronger than that, for here it is alleged upon the record that the court was holden from *three weeks* to *three weeks*; the day therefore was certain: *Nam certum eſt quod certum reddi poteſt.*

We are, therefore, all of opinion, that theſe three objections ought to be over-ruled, and judgment given for the defendant.

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*Thurſday, Feb.* 10th.

An *indorſee* of a promiſſory note payable three months after date, may be diſcharged under an inſolvent act, which takes place *before* the three months are expired: for it is *debitum in præſenti, ſolvendum in futuro.*

## WORKMAN *verſus* LEAKE.

MR. *Lucas* had obtained a rule to ſhew cauſe, why the defendant ſhould not be diſcharged upon filing common bail; the cauſe of action for which he was arreſted, accruing prior to the inſolvent act 12 *Geo.* 3. *c.* 23. which act took place, 1ſt of *January* 1772, and under which the defendant had obtained his diſcharge. The nature of the debt was as follows: The defendant had indorſed a note, dated the 28th of *October* 1771, drawn by one *Hodgſon*, payable to the defendant, or order, three months after date; and at the ſame time he gave an undertaking to pay to the plaintiff a certain ſum for goods then ſold and delivered to the ſaid *Hodgſon*, on ſix months credit given for the ſaid goods. The defendant was arreſted upon the note.

Mr. *Lucas* in ſupport of the rule cited *Liſle* verſus *Jenyns*, 1 *Barnes* 81.

Mr. Juſtice *Willes* mentioned the caſe of *Macarty* verſus *Barrow*, 2 *Str.* 949. where the defendant, who was the drawer of certain bills proteſted for non-acceptance, between the drawing and return became bankrupt; and being ſued to execution moved to be diſcharged under the ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 7. and was diſcharged accordingly.

Lord *Mansfield.* Upon the motion I doubted; but my clerk has ſince reminded me that upon application I have made twenty ſuch orders.

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The words of the ſtat. 12 *Geo.* 3. *c.* 23. *ſect.* 27. are much larger than thoſe of the ſtat. 5 *Geo.* 2. *c.* 30. *ſect.* 7. which latter ſtatute mentions only ſuch debts as were *due* or *owing* at the time the party became bankrupt; whereas this ſtatute extends to all debts, contracted, incurred, occaſioned, owing, or *growing* due. I am clearly of opinion that this is *debitum in præſenti, ſolvendum in futuro:* and conſequently, being due on the 1ſt of *January* 1772, it is diſcharged under this act. Otherwiſe, if it had depended upon a *contingency:* becauſe there, till the event happens, it is no debt.*

The three other judges concurred.

*Per cur.* let the rule be made abſolute.

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## FREAME et UXOR *verſus* PINNEGER.

*Saturday, Feb.* 12th.

Motion to ſet aſide an award muſt be made *before* the laſt day of the next term after ſuch award is publiſhed; otherwiſe it is too late; and an attachment for the non-performance of it may iſſue.

MR. *Morris* ſhewed cauſe why an award ſhould not be ſet aſide, and at the ſame time moved to make abſolute a rule for an attachment for the non-performance of it. His grounds againſt ſetting aſide the award were two; 1ſt. That the application was too late, the award being a ſubmiſſion within ſtat. 9 & 10 *W.* 3. *c.* 15. *ſect.* 2. which provides, "that any arbi- "tration procured by corrupt or undue means ſhall be adjudged "void, &c. ſo as complaint of ſuch corruption, &c. be made "in the court where the rule is made for ſubmiſſion to ſuch ar- "bitration, before the laſt day of the next term, after ſuch ar- "bitration made and publiſhed to the parties." In this caſe, the application was not originally made till *after* the expiration of that time. Therefore it is now too late. 2dly. Upon the merits.

Mr. *Wallace*, Mr. *Mansfield*, and Mr. *Dunning*, *contra*. That the objection to the award was within time; the application being made as ſoon as they were called upon by a motion for an attachment to enforce the award.

* *N. B.* In the caſe of *Paget* verſus *Wheate*, *Eaſter* term 21 *Geo.* 3. the ſame point occurred. That was an action upon a bond bearing date the 21ſt of *September* 1777; Plea, inſolvent debtors act, 18 *Geo.* 3. *c.* 52. and that the cauſe of action was contracted before the 28th of *January*, 1778, when the act took place. Replication ſetting forth the condition of the bond, by which it appeared it was conditioned for payment on the 21ſt of *September* 1778. To this the defendant demurred. The queſtion was, whether the bond was diſcharged? The court took time to conſider; and afterwards, in the ſame term, Lord *Mansfield* delivered the opinion of the court, that the bond was diſcharged, upon the authority of the above caſe of *Workman* verſus *Leake*.

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FRAME *verſus* PINNIGER.

Lord *Mansfield* after ſtating the clauſe and proviſo in the ſtatute obſerved, that though the firſt clauſe was inaccurately penned, yet the meaning of it was ſufficiently explained by the proviſo in ſection 2. and ſaid, he was extremely clear from the words of the proviſo, that the time of objecting to an award is expreſsly limited to the laſt day of the term next after it is publiſhed. He was equally clear, that where no objection is made within ſuch limited time, the other ſide may apply for an attachment to enforce the performance of the award. In this caſe the impeachment of the award being ſubſequent to the time preſcribed by the ſtatute, was therefore too late: And the motion for an attachment clearly regular.

The court ordered the rule for ſetting aſide the award to be diſcharged, but without coſts: And that the attachment ſhould lie in the office a month after bringing in the money before the maſter.

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Same day.

## REX *verſus* SMITH.

No *certiorari* lies on the ſtat. 30 *G.* 2. *c.* 24.

MR. *Davenport* had moved for a *certiorari* to the juſtices of *Middleſex* to remove an indictment againſt the defendant upon the ſtatute of 30 *Geo.* 2. *c.* 24. for the more effectual puniſhment of perſons obtaining goods or money under falſe pretences, *&c.* he ſaid, it was a doubt whether a *certiorari* would lie: and now, upon ſhewing cauſe, the court were clearly of opinion it would not.

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Same day.

## GOLDING *qui tam verſus* BARLOW.

*Quære*, if an informer in a *qui tam* action ſhall be obliged to give ſecurity for coſts?

MR. *Selwyn* had obtained a rule for the plaintiff in a *qui tam* action, to give ſecurity for the coſts upon affidavit of the lowneſs of his circumſtances.

Mr. *Dunning* now ſhewed cauſe, and inſiſted that this was not the practice. And Lord *Mansfield* ſaid, that the court would not do it in the caſe of a foreigner's* being a plaintiff; nor in matters of property, except in ejectment, where the leſſor of the plaintiff is an infant. But the queſtion in this

* *Vide* 2 *Str.* 1206. *Real et al.* v. *Macky*, where the court refuſed to ſtay the proceedings in the caſe of a *foreigner, et poſt.* *Nuncomar* v. *Burdett*, *Mich.* 15 *Geo.* 3. where it was refuſed upon motion in the firſt inſtance, as a *ſettled* point.

caſe

caſe was put an end to by an affidavit, ſtating the plaintiff to be a perſon of property. Whereupon the rule was diſcharged. 1774.

GOLDING *verſus* BARLOW.

## BOUTEFLOUR *verſus* COATES.

Same day.

A certificate diſcharges a bankrupt from a debt accruing *before* the commiſſion tho' judgment be not obtained till *after* the certificate allowed.

UPON a rule to ſhew cauſe why the defendant, who was a bankrupt and had obtained his certificate, ſhould not be diſcharged, the ſhort ſtate of the caſe was, that in a former action againſt the defendant, he had given a bail-bond to the ſheriff, which was forfeited before the commiſſion, by non-appearance. The preſent action was brought upon this bail-bond, and the defendant had obtained his certificate under the commiſſion, but the judgment was not obtained till after the certificate allowed.

Mr. *Manſfield* for the defendant, Mr. *Wallace* for the plaintiff.

Lord *Manſfield.* Here was a breach, and the penalty forfeited; therefore the debt was due, though execution could not be taken out for more than the damages. It is not the caſe of a contingent debt, not reduced to a certainty; which is not diſcharged by the certificate.

The three other judges were of the ſame opinion. Rule made abſolute.

THE END OF HILARY TERM 14 GEORGE III.

# EASTER TERM

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## REX *verſus* CROKE.

*Tuesday, April* 21ſt.

Where by *ſtatute*, a ſpecial authority is delegated to particular perſons, affecting the *property* of individuals, it muſt be *ſtrictly* purſued; and appear to be ſo upon the *face* of their proceedings.

BY ſtat. 9 *Geo.* 3. *c.* 89. entitled "an act for making a road "from *Blackfriars Bridge* acroſs *St. George's Fields*, *&c.*" a power is given to the *mayor*, *aldermen*, and *commons* in *common council aſſembled*, to treat with the owners, and occupiers of, and other perſons *intereſted* in ſuch houſes, lands, and tenements, as ſhall be *neceſſary* to be purchaſed for the purpoſes of the act, for the purchaſe of the ſame: And it is enacted, "that all bodies "politic, *&c.* and every perſon poſſeſſed of, or intereſted in, any "lands, *&c.* which, by the ſaid *mayor*, *aldermen*, and *commons* in "*common council aſſembled*, ſhall be thought *neceſſary* for any of the "purpoſes of the act, ſhall have power to ſell and convey any of "ſuch lands, *&c.* to the *mayor*, *commonalty*, and citizens of the "city of *London*. And in caſe of refuſal or inability to treat, "then the juſtices of the county of *Surry* at their quarter ſeſſions, "or at any adjournment, are required upon application of the "ſaid *mayor*, *aldermen*, and *commons* in *common council aſſembled*, "or of any perſons on their behalf, to iſſue a precept to the "ſheriff to ſummon a jury, who are to aſſeſs the value of "ſuch lands, and of the *proportionable value* of the reſpective "eſtates and *intereſts* claimed therein, *notice in writing* having "been previouſly given to the perſons intereſted, at leaſt "*fourteen days before*, and left at the dwelling-houſe or uſual "place of abode of ſuch perſon, or with ſome tenant of ſuch "lands, *&c.*" and it is further enacted, "that all and every "perſon and perſons, who ſhall have any *mortgage* or *mort-*"*gages* on ſuch lands, tenements, and hereditaments, *not*

"being

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" being *in poſſeſſion* thereof by virtue of ſuch mortgage or " mortgages, ſhall, on the tender of the principal money and " intereſt due thereon, together with ſix months intereſt of " the ſaid principal money, by the ſaid *mayor*, *aldermen*, and " *commons*, in *common council aſſembled*, or by any perſon or " perſons whom they ſhall appoint, immediately aſſign ſuch " mortgage or mortgages to the ſaid *mayor*, and *commonalty* and " *citizens*, or ſuch perſon or perſons as they ſhall appoint in " truſt for them; or, in caſe ſuch mortgagee or mortgagees " ſhall have notice in writing from the ſaid *mayor*, *aldermen*, " and *commons* in *common council aſſembled*, that they will pay " off and diſcharge the principal and intereſt, which ſhall be " due on the ſaid mortgage or mortgages, at the end or ex- " piration of ſix calendar months, to be computed from ſuch " notice given; that then, at the end of the ſaid ſix months, " on payment of the principal and intereſt ſo due, ſuch mort- " gagee or mortgagees ſhall aſſign his, her, or their intereſts in " the premiſes to the ſaid *mayor* and *commonalty* and *citizens*, " or ſuch perſon or perſons as they ſhall appoint in truſt for " them; and in caſe ſuch mortgagee or mortgagees ſhall refuſe " to aſſign as aforeſaid, on ſuch tender or payment, then all " intereſt on every ſuch mortgage, ſhall ceaſe and deter- " mine."

The defendant, being a mortgagee *out of poſſeſſion* of a greater quantity of land than the commiſſioners wanted, had inſiſted that he was entitled under the act to the whole of ſuch mortgage money. The city refuſed to comply with this demand; whereupon a jury was empannelled, and the quarter ſeſſions, upon a hearing, made the following order.

*Surry*, to wit. " BE it remembred that in purſuance of an " act of parliament made in the 9th year, *&c.* at a general quar- " ter ſeſſions of the peace, *&c.* holden, *&c.* at *Southwark*, *&c.* " before *Joſeph Mawby*, *&c.* juſtices, *&c.* aſſigned to keep the " peace in the county aforeſaid, *&c.* upon application being " made, *&c.* by and on behalf of the *mayor and commonalty and* " *citizens* of the city of *London*, the ſaid court *did* iſſue a precept, " directed to the ſheriff of, *&c.* to empannel, *&c.* a competent " number of perſons qualified to ſerve on juries, *&c.* to in- " quire and aſſeſs upon their oaths, the value of *all that piece* " of ground in the tenure or *occupation* of *George Holroyd*, and " of the *proportionable value* of the *reſpective eſtates* and intereſts " claimed therein, or in any part thereof, ſo that the ſaid court " might

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" might give ſuch judgment thereupon, as in and by the ſaid " act they *were* authoriſed to give, and they lawfully *might*, to " the end that the ſaid ground and premiſſes, and the ſeveral and " reſpective eſtates and intereſts therein, might be veſted in the " *mayor* and *commonalty* and *citizens* of the ſaid city of *London*, " in and for the purpoſes in the ſaid act mentioned: And after- " wards, to wit, at an adjournment. *&c.* out of ſuch perſons, a " jury of twelve perſons *are* drawn, to inquire of the value of " the ſaid premiſſes, and of the proportionable value of the re- " ſpective eſtates and intereſt claimed therein, or in any part " thereof; who having proceeded to hear evidence given upon " oath duly adminiſtered by the ſaid court, and what is alleged " by the council on behalf of the *mayor and commonalty and ci-* " *tizens* of the ſaid city of *London*, and on proof upon oath of " *due notice* having been given to *Benjamin Croke*, *&c.* of *Primroſe* " *Street*, *&c.* a *mortgagee* or aſſignee of the premiſſes, of this " application to the court, for their verdict upon their oaths, " ſay, that the eſtate and intereſts in the ſaid premiſſes for and " during the remainder of a leaſe, of amongſt others the ſaid " premiſſes claimed by the ſaid *Benjamin Croke* as a mortgagee " or aſſignee thereof, of which leaſe there were four years un- " expired at *Michaelmas* 1772, are of the value of 200 *l.* There- " fore it is conſidered and adjudged by the ſaid court, that the " ſaid ſum of 200 *l.* ſo found by the ſaid jury in manner afore- " ſaid, be the *value* of the *ſaid eſtate* and *intereſt*; and they do " aſſeſs and award, that the ſame be paid for the purchaſe there- " of, to the ſaid *Benjamin Croke*, *or* to *ſuch other perſon* or perſons " as is or are *ſeiſed* of or *intereſted* in the ſame, according to his " and their *reſpective* eſtates or intereſts therein, on making " out a good title to the ſame, and executing proper convey- " ances and aſſignments thereof, to the *mayor* and *commonalty* and " *citizens* of the ſaid city of *London*."

This order being removed by *certiorari*, Mr. *Bearcroft* on the part of the defendant, took four exceptions.

*Firſt*, it is not ſtated that the " *mayor*, *aldermen*, *and commons* " *in common council* aſſembled," have adjudged theſe lands to be *neceſſary* for the purpoſe. *Secondly*, It is ſtated, that the application was made by the *mayor*, *commonalty*, and *citizens*, inſtead of being made by the " *mayor*, *aldermen*, and *commons* in *common coun-* " *cil* aſſembled," as the act directs. *Thirdly*, it is not ſtated, whether the defendant is a mortgagee in or out of poſſeſſion, but only that he is a mortgagee: which is uncertain and inſufficient; becauſe

becauſe a ſpecial proviſion is made by the act with reſpect to a mortgagee out of poſſeſſion, which proviſion has not been complied with in this caſe. *Fourthly*, that though the proceedings appear upon the face of them to have been at different times, they are all ſtated in the paſt, inſtead of the preſent tenſe, which is fatal: becauſe all proceedings before juſtices, being ſuppoſed to be entered at the moment, ought to be in the preſent tenſe. And he cited Ld. *Raym.* 1347. *Rex* v. *Roberts*, 1 *Str.* 608. ſame caſe, as an authority in point.

To this it was anſwered by Mr. ſerjeant *Glynn* for the proſecution, 1ſt. That there is no need of any act of the *mayor*, *aldermen* and *commons*, in *common council* aſſembled, *adjudging* that the lands are *neceſſary* to be purchaſed; for they are the perſons who apply to purchaſe the lands, and therefore of neceſſity appear to adjudge them neceſſary to be purchaſed. 2dly. The application by the *mayor*, *commonalty*, and *citizens* is well enough, for they are the corporation, and include the mayor, aldermen, and commons in common council aſſembled, who are the repreſentatives and the acting part of the corporation. 3dly. It is immaterial to ſtate whether the *mortgagee* was *in* or *out* of poſſeſſion, for in either caſe he has an eſtate and *intereſt*; therefore the ſeſſions had juriſdiction; and the act does not require that a tender ſhould be made of the whole mortgage money, but only for ſuch part as ſhall be neceſſary for the purpoſes of the act. 4thly. The ſtating a paſt tranſaction is more properly expreſſed in the paſt, than in the preſent tenſe.

Lord *Mansfield*. This is a ſpecial authority delegated by act of parliament to particular perſons, to take away a man's property and eſtate againſt his will; therefore it muſt be *ſtrictly* purſued, and muſt appear to be ſo upon the *face* of the order.

Several objections have been taken to this order in point of form, which are material. 1ſt. That the *mayor*, *aldermen*, and *commons*, in *common council* aſſembled, have not given an opinion, that the lands are neceſſary to be purchaſed, nor that an application was made by them to the juſtices, but that an application was made by the *mayor*, *commonalty*, and *citizens*. Now they are two diſtinct things; the one is a *ſelect* body, the other is the *corporation* at large: and we cannot here go into any fact tending to reconcile ſuch diſtinction, or to ſhew that in truth the latter are the proper perſons. But it ought to have been ſtated, that the mayor, aldermen, and commons, in common council aſſembled, had given ſuch opinion; and that an application had been made by them to the juſtices.

The *mayor*, *aldermen*, and *commons* in *common council aſſembled*, are not ſufficiently deſcribed by the *mayor* and *commonalty* and *citizens*, tho' in fact the latter include the former.

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There is another objection in point of form, which is not mentioned at the bar; which is, that the order does not ſtate that a *notice was* given *in writing* to Mr. *Croke* according to the requiſites ſpecified in the act; but only ſays "upon proof of "*due* notice having been given to him," which is inſufficient, a particular notice being ſpecified by the act.

If a *particular* form of *notice* be preſcribed, it muſt be *fully* ſet out and *preciſely* purſued: An allegation that *due notice* was given is not ſufficient.

The adjudication muſt follow the proviſions of the act.

As to the caſe upon the merits, it appears, that the defendant is a mortgagee *out* of poſſeſſion of this piece and of ſome other lands for a term of years of which four only are to come. Now the act has made an *expreſs* proviſion in the caſe of a mortgagee out of poſſeſſion, and has directed, that upon payment of principal, intereſt and coſts, the mortgagee ſhall make an aſſignment of his mortgage. The reaſon ſeems to be this; that there can be no account to ſettle between mortgagor and mortgagee; and no injuſtice is done in reſpect of the mortgagor; becauſe the mortgagee might always aſſign to any other perſon. As to a mortgagee in poſſeſſion, the act is totally ſilent. But the city, inſtead of proceeding upon the clauſe abovementioned, have conſidered the defendant as a proprietor having an intereſt in the whole land: beſides, the mortgagor is not ſummoned, nor made a party, nor is any ſum adjudged to him; and inſtead of fixing the value and proportion of each reſpective intereſt, they have adjudged that the 200 *l.* ſhall be paid to the defendant, or to ſuch other perſon as ſhall be ſeiſed, *&c.* according to their intereſt. Who that perſon is, or what proportion he is entitled to, does not appear. Therefore both in point of ſubſtance, as well as in form, this order is greatly defective.

We deſire not to be underſtood to give our opinion that the city may not proceed againſt the mortgagor and mortgagee as perſons intereſted under the *firſt* clauſe; but then they muſt both be joined.

A defective notice is not cured by the appearance of the party.

*Aſton*, Juſtice. This order is very defective. The want of notice to the mortgagor is very material: and with reſpect to the mortgagee, the notice required by the act ought to have been fully ſet out, and preciſely purſued: and it is not cured by his appearance.

The adjudication and award of the value, does not anſwer the direction of the act; which ſays, that judgment may be given of the *reſpective* intereſts; whereas this order is to pay the 200 *l.* to the defendant, or ſuch perſons as ſhall be intereſted therein:

This

This is no apportionment or declaration of the reſpective intereſts; and therefore it is inſufficient. 1774.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

*Per Cur.* Let the Order be quaſhed.

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## WRIGHT *verſus* HOLFORD.

*Friday, April* 22d.

THIS was a caſe out of Chancery upon the conſtruction of a will, and the material facts were as follow;

That by articles of agreement bearing date the ——— day of ——— 1755, and entered into in conſideration of marriage, the teſtatrix *Conſtantia Maria Holford* was empowered to diſpoſe from time to time by deed, atteſted by two witneſſes, or by will duly atteſted by three witneſſes, of ſuch eſtates as ſhould come to her during her coverture. In the ſame year the marriage was had; and on the 21ſt of *April* 1758, upon the death of her uncle, who was tenant for life of the eſtates in queſtion, ſhe became entitled by deſcent, as co-heir, to one undivided moiety of the ſoid eſtates. On the 3d of *May* 1758, ſhe made her will, and appointed "All her ſaid undivided moiety, to truſtees, to "the uſe of her huſband *Peter Holford* for life, with limita- "tion to preſerve contingent uſes, remainder to her ſons to be "begotten on her body, and in default of ſuch iſſue, to the "uſe of all and every the daughter and daughters of the ſaid "*Peter Holford*, and her the ſaid *Conſtantia Maria Holford*, "lawfully to be begotten, and to the heirs of their body and "bodies; ſuch daughters, if more than one, to take as tenants "in common, and not as joint-tenants; and for default of ſuch "iſſue, to the uſe of her right heir."

Deviſe "to the uſe of all and every the daughter and daughters of &c. and the heirs of their *body* and *bodies*; ſuch daughters, if more than one, to take as tenants in common, and not as joint-tenants; and for *default of ſuch* iſſue, to the uſe of the teſtatrix's right heirs." The daughters take croſs remainders.

The teſtatrix died, leaving *John Wright* her heir at law; and leaving by her ſecond huſband, two daughters, *Conſtantia* and *Catherine*: *Conſtantia* died at the age of two years; *Peter Holford*, *John Wright*, and *Catherine Holford* living. The queſtion for the opinion of the Court was, Whether on the death of the daughter *Conſtantia Holford*, without iſſue, the plaintiff, *Wright*, as heir at law, became entitled to the ſhare of the eſtate of *Conſtantia Holford*; or whether there were croſs remainders between the daughters.

Mr. Serjeant *Hill*, on behalf of the plaintiff, the heir at law, ſtated it to be a principle of law, as old as the time of *Hen.* 7. that an

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an heir at law is not to be diſinherited, but by an *expreſs* deviſe or *neceſſary* implication: A probable intent or conjecture is not ſufficient. 13 *H.* 7. 17. *b. Gardiner* v. *Sheldon. Vaughan* 262. 268. S. P. Therefore without ſuch expreſs deviſe, or neceſſary implication, no croſs remainder could be raiſed in the preſent caſe. Firſt then, as to *expreſs* words, there can be no pretence of any in the deviſe in queſtion. And ſecondly, There are no words from whence to infer by *neceſſary* implication, that it was clearly the intention of the teſtatrix to create croſs remainders as between the daughters. On the contrary, the words are in ſubſtance the ſame as thoſe in the caſes of *Comber* v. *Hill*, 2 *Str.* 969. and *Williams* v. *Brown*, 2 *Str.* 996. in both of which the court was clearly of opinion againſt raiſing croſs remainders. In *Comber* v. *Hill* the deviſe was "To *Richard* "*Holden* and *Elizabeth Holden*, equally to be divided, and "to the heirs of their reſpective bodies, and for default "of ſuch iſſue, to *Ann Holden* in fee." In *Williams* v. *Brown* the teſtator deviſed "to the uſe of all and every the child "and children, both male and female, born and to be born of "the body of *Mehetabel*, equally to be divided between them, "and of the heirs of their *reſpective* bodies; for want of ſuch "heirs, remainder over." If theſe caſes differ at all from the preſent, it is only in the addition of the word "reſpective," which if inſerted here would have been ſuperfluous; becauſe by "*ſuch iſſue*" is neceſſarily implied *reſpective* iſſue; and ſo it is laid down by Lord *Cowper* in *Cook* v. *Cook*, 2 *Vern.* 545, 6. "a de-"viſe to the teſtator's two daughters, and their iſſue; and in "default of ſuch iſſue to *J. S.* they have a joint eſtate for life, "and ſeveral inheritances: if one of the daughters dies without "iſſue there ſhall not be croſs remainders: but her moiety ſhall "go over to the remainder-man for want of *ſuch* iſſue, i. e. *re-*"*ſpective* iſſue."—Thirdly, In moſt of the caſes where the implication has been raiſed, it has been in favour of the *heir* at law. It was ſo in the caſe of *Doe*, on the demiſe of *Burville* v. *Burville*, *Paſch.* 1773, *R. B.* for if the implication had not been raiſed, the eſtate would have gone from the heir at law. That conſideration was likewiſe the principal ground upon which the caſe of *Holmes* v. *Meynell* was determined, *T. Raym.* 453. Sir *T. Jones*, 172. and the caſes there cited; 13 *H.* 7. 17. 4 *Leon.* 14. *pl.* 51. and *Dyer*, 330. *Clache*'s caſe ſupports the ſame doctrine. Fourthly, It is a rule, that croſs remainders cannot be implied between more than *two*. In *Cro. Jac.* 656. a deviſe to *three* and the heir of their bodies, and in default of

iſſue

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iſſue remainder over, was held *not* to create croſs-remainders. It is true, that in this caſe there were in fact only two; yet there might have been more, and therefore it is within the reaſon of the above principle. *Laſtly*, a croſs-remainder is never favoured in law, and ſo Lord *Hardwicke* held in 1 *Atkyns* 580; confirming at the ſame time the ſettled and eſtabliſhed doctrine, that it can only be raiſed by an implication abſolutely neceſſary. As all the caſes therefore, where croſs-remainders have been allowed, are either in favour of the heir at law, or under circumſtances in which the eſtate would otherwiſe have gone from him, and as no certain intent appears in this caſe to raiſe them, the court will not imply them againſt the title of the preſent heir.

Mr. *Hargrave contrà* for the defendant. The expreſſion "to "*all and every* the daughter and daughters, and the heirs of "their *body* and *bodies*," not only furniſhes a *neceſſary* implication, but *expreſsly* creates croſs-remainders as between them. For *firſt*, if there had been one daughter only, ſhe would clearly have taken the whole eſtate by this deviſe, in excluſion of the heir at law; and of courſe it was impoſſible that the teſtatrix in the one caſe ſhould intend to give her the whole, and in the other only half. Again, the words "in default of ſuch iſſue," can neither be conſtrued nor applied in any other manner than as relative to the iſſue of all and *every* daughter; which plainly ſhews that the reverſion in fee was not to come into poſſeſſion, but upon failure of iſſue of every daughter. In anſwer to the authorities, he cited a caſe *Mich.* 13 & 14 *Eliz. anon.* in *Dyer* 303. *pl.* 49. "The teſtator deviſed two parts of his eſtate to his four younger "ſons, and the heirs male of their bodies begotten, and if they all "die without iſſue male of their bodies, or any of their bodies, "the two parts were to revert to the right heirs of the deviſor. "Three of the younger ſons died; and the court were of opinion, "that the ſurvivor had an eſtate-tail in the whole two parts." Again in 4 *Leon.* 14. *pl.* 51. cited by Serjeant *Hill*, it was in terms expreſsly adjudged, "that the eldeſt ſon ſhould take the "eſtate by the *implicative* deviſe." But he relied principally on the caſe of *Holmes* verſus *Meynell*, *Raym.* 453. reported likewiſe in *Pollexfen* 425. as in point. The deviſe there was "to "the teſtator's two daughters and their heirs, equally to be di-"vided between them, and in caſe they happen to die without "iſſue, then to his nephew *Francis* in tail."—And the court held, "that *Francis* took nothing till both were dead without "iſſue." As to *Clache*'s caſe, it was determined upon the particular words which amounted to a ſpecial limitation of the

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eſtate of the teſtator himſelf; under which circumſtances, the court held there could be no implication of a croſs-remainder. So in *Dyer* 326. in the margin, it is ſaid to have been held by the court, that if a deviſe be to two brothers in tail, and if they die to the daughter; if one dies without iſſue, it is no croſs-remainder; becauſe there is an expreſs eſtate, and therefore it ſhall not be taken by implication.

With reſpect to the caſe of *Gilbert* verſus *Witty* and others, *Cro. Jac.* 655. there were two reaſons againſt implying croſs-remainders in that caſe. The firſt, that it was a deviſe to three ſons ſeverally by expreſs limitation; and ſecondly, becauſe it is a univerſal principle, that there cannot be a croſs-remainder by implication between more than two. With reſpect to *Comber* verſus *Hill*, he took this diſtinction; that, in that caſe, the words "*all* and *every*" were omitted, and the word "*reſpective*" is not inſerted in the caſe in queſtion. The caſe of *Williams* verſus *Brown* is rather ſtronger in favour of the plaintiff, the words "all and every" being there made uſe of; but the chief ground upon which the court decided that caſe was the inſertion of the word "*reſpective*." With regard to the caſe in *Atk.* 580. he ſaid it was ſufficient to obſerve, that the court determined it abſolutely upon the expreſſion in the will —to their "*ſeveral*" and "*reſpective*" iſſues.

The court took time to conſider.—Afterwards, on *Monday* the 16th of *May*, Lord *Mansfield* delivered the opinion of the court, which he introduced as follows:

I found it a cuſtom, in caſes ſent by the court of *Chancery* for our opinion, to certify it privately to the Lord Chancellor in writing, without declaring in this court either the opinion itſelf, or the reaſons upon which it was grounded. But I think the cuſtom wrong, as well as unſatisfactory to the bar: and therefore in the two caſes that now wait our certificate, and for the future, we ſhall declare our opinion in this court.

Our certificate in the preſent caſe is in theſe words—"There "are no words in the inſtrument, bearing date the 3d of *May* "1758, which intimate any intention to limit over the *reſpective* "ſhares of the two daughters dying without heirs of their bo-"dies *reſpectively*; on the contrary, the limitation over is of the "whole eſtate, limited to all the daughters, and is to take place, "on the expreſs contingency of *failure* of *all* and *every* the "daughter and daughters, and the heirs of their *body* and *bodies*; "and the limitation over on default of *ſuch iſſue* is, to the heir "at law. Conſequently we are of opinion, that as nothing is

"given

" given to the heir at law, whilſt *any* of the daughters or *their* " *iſſue* continue, they muſt amongſt themſelves take croſs-re- " mainders."

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*N. B.* Lord *Mansfield* added, that the introductory words of " there being nothing in the inſtrument of *May* 3d, 1758, which " ſhewed the limitation over to the right heir was to take " place upon failure of *either* of the daughters and their iſſue " *reſpectively*," were emphatically put in, in anſwer to the caſes of *Comber* verſus *Hill*, and *Williams* verſus *Brown*, cited in the argument by Serjeant *Hill*; and in order to ſatisfy his doubts.

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## REX *verſus* CLARKE.

*Saturday, April* 23.

One, convicted of *playing* at *bowls*, upon the ſtat. 33 *Hen.* 8. *c.* 9. *ſect.* 16. is not puniſhable as a *diſorderly* perſon.

THIS was a conviction upon ſtat. 33 *Hen.* 8. *c.* 9. *ſect.* 16. in effect as follows:

" Be it remembered, that on, &c. *Samuel Powey*, and *Stephen* " *Bulling* of, &c. came before me *William Codrington*, one, &c. " and gave me to underſtand and be informed, that *Thomas* " *Clarke* of, &c. labourer, on the 16th of *Auguſt* 1773, did uſe " and play at a certain unlawful game with *bowls* and *pins*, called " *bowlruſhing*, with divers liege ſubjects of our ſaid lord the " king, and did then and there obtain and receive divers ſums " of money of the ſaid ſubjects playing at the ſaid game, againſt " the form of the ſtatutes in that caſe, &c. and againſt the peace, " &c. and pray that the ſaid *Thomas Clarke* may be convicted of " the ſaid offence: Whereupon afterwards, on the 8th of *Sep-* " *tember* 1773, the ſaid *Thomas Clarke* being apprehended and " brought before me, &c. to anſwer to the ſaid charge, &c. " the ſaid *Thomas Clarke* is aſked by me, if he can ſay anything " for himſelf why he the ſaid *Thomas Clarke* ſhould not be " convicted of the premiſes above charged upon him, &c. and " thereupon the ſaid *Thomas Clarke*, of his own accord, fully " acknowledges the premiſes, &c. to be true as charged, and " does not ſhew to me any ſufficient cauſe why he ſhould not " be convicted thereof. Whereupon all and ſingular the pre- " miſes, &c. being conſidered, and due deliberation being there- " unto had, I do adjudge and determine that the ſaid *Thomas* " *Clarke* is guilty of the premiſes, &c. and that the ſaid *Tho-* " *mas Clarke* is therefore an *idle* and *diſorderly perſon*, and is alſo, " therefore a *rogue* and *vagabond*, within the true intent and " meaning of the ſtatutes in that caſe made and provided. And " the ſaid *Thomas Clarke* is accordingly by me convicted of the

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"offence charged upon him in and by the ſaid information, "and of being an *idle* and *diſorderly perſon*, and a *rogue* and "*vagabond* in form aforeſaid: and I do hereby adjudge and order "that the ſaid *Thomas Clarke* be therefore *committed* to the "houſe of correction, there to remain for the ſpace of *one month*, "being a leſs time than until the next general quarter ſeſſions "of the peace; or until the ſaid *Thomas Clarke* ſhall find ſuf-"ficient ſureties to be bound in recognizance to appear before "the next quarter ſeſſions, and for his good behaviour in the "mean time."

Mr. *Selwyn* laſt term took exception to this conviction, becauſe it was not alleged in the information that the playing at bowls was *out* of the defendant's *own orchard*, and it is only unlawful *ſub modo*: And the court upon this exception quaſhed the conviction.—Afterwards, in the ſame term, Lord *Mansfield* ſaid, a doubt had ariſen, whether, as by another part of the 16th *ſection* of ſtat. 33 *Hen.* 8. it is made unlawful for a *labourer* to play at any time *out* of *Chriſtmas*, the conviction was not good; as the defendant was ſtated to be a *labourer*, and the *playing* laid on the 16th of *Auguſt*. But, his lordſhip obſerved, the puniſhment appeared to be under the vagrant act, 17 *Geo.* 2. *c.* 5. *ſect.* 2. therefore deſired it might be ſpoken to again upon this new point, and alſo conſidered, whether it was a good adjudication under this latter ſtatute.

And now Mr. Juſtice *Aſton* (Lord *Mansfield* abſent) delivered the opinion of the court.

This conviction is a jumble and confuſion of charges and puniſhments. It is a conviction for playing at bowls, and the puniſhment inflicted is impriſonment as being an idle and diſorderly perſon. The ſtat. 33 *H.* 8. *c.* 9. *ſect.* 16. lays a penalty of 20*s.* on every labourer, *&c.* playing at bowls out of *Chriſtmas*. The puniſhment therefore is clearly not under this ſtatute. The ſtat. 17 *Geo.* 2. *c.* 5. *ſect.* 2. deſcribes *four* kinds of idle and diſorderly perſons: and being an explanatory act, we cannot go out of it. Now *bowling* is not an offence within any of theſe deſcriptions; conſequently the defendant is not puniſhable as an idle and diſorderly perſon. But the puniſhment here is under this latter ſtatute. Therefore we are all clearly of opinion that the conviction ought to be quaſhed.

Playing at bowls does not conſtitute an idle and diſorderly perſon within the proviſions of the ſtat. 17 *Geo.* 2. *c.* 5.

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## NORRIS *verſus* TYLER.

*Same day.*

In an action for a malicious proſecution, verdict in favour of the *defendant* refuſed to be ſet aſide, tho' againſt evidence.

THIS was an action for a malicious proſecution in preferring a bill of indictment againſt the plaintiff for forging a note of hand. Four witneſſes were called to prove that the hand-writing was not the plaintiff's, and the judge directed the jury in his favour: But the jury found a verdict for the defendant. Upon a motion for a rule to ſhew cauſe why the verdict ſhould not be ſet aſide, as being a verdict againſt evidence, and why a new trial ſhould not be granted, the court ſaid the defendant had been ſufficiently tried once, where the ſuit was of a criminal nature.

Motion denied.

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## JONES *verſus* RANDALL and Another.

*Monday, April* 25th.

Action lies to recover money won upon a wager, "Whether "a decree of the "court of "Chancery "would be "reverſed "or not on "appeal "to the "Houſe of "Lords;" unleſs the motive be *fraud* or other *turpis cauſa*.

*ASSUMPSIT* upon a wager, "Whether a decree of the "court of Chancery would be reverſed on appeal to the "Houſe of Lords." The decree was reverſed; whereupon the plaintiff brought this action, and obtained a verdict for fifty guineas, the amount of the wager laid.

Mr. *Dunning* had moved in arreſt of judgment: *Firſt*, Becauſe the event was not contingent, but certain; and *ſecondly*, becauſe the contract was illegal, being *contra bonos mores*.

Mr. *Wallace* and Mr. *Mansfield* now ſhewed cauſe; 1. This was a fair tranſaction between the parties, whoſe knowledge, or rather ignorance, reſpecting the event, left it equally uncertain in whoſe favour it would finally be decided. Therefore, as between them, it was certainly contingent. 2. It is not within any of the ſtatutes againſt gaming; and therefore, like all other bets which are not prohibited by poſitive law, recoverable by action. 3. With reſpect to its being illegal, there is no caſe in point; and therefore, if immoral, it muſt be decided to be ſo from the nature of the contract itſelf. But is it more immoral than a wager between two ſons upon the lives of their reſpective fathers, which was the caſe of the Earl of *March* v. *Pigot*, *Trin.* 11 *G.* 3. *B. R.* and adjudged a good and valid wager? There is no fraud; no impoſition imputed to either of the parties; no ſuggeſtion of any perſonal influence with reſpect to the de-

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ciſion; nor does it in itſelf import any *diſreſpect* to the judicature of the Houſe of Lords, but was meant by the plaintiff merely as a ſort of inſurance upon his cauſe; therefore there is no ground to ſay that this contract is in its nature an illegal contract.

Mr. *Dunning*, in ſupport of the rule, began by ſtating, that in *fact* it was an *uſurious* bet to prevent the plaintiff being ſent to gaol; but allowed that the court muſt decide upon the *record only*.

He admitted that this was not a caſe within any of the acts of parliament againſt gaming; nor did the idea of perſonal influence make any part of the ground of his objections: at the ſame time he inſiſted, that if ſuch a wager had been laid by a member of the Houſe of Lords, it would not have been competent to him to recover it. What was law therefore to one perſon, was law to every other perſon of whatever denomination.

But he ſaid, the queſtions upon this motion are two: *Firſt*, Whether this wager is fair? *Secondly*, Whether it is not void, as being contrary to *common decency*? It is eſſential to the validity of a wager that the event be *contingent*: But the laws of this country are clear, evident, and *certain*: All the judges know the laws, and, knowing them, adminiſter juſtice with uprightneſs and integrity. The event therefore was certain, and of courſe the wager ſuch, as in its nature was impoſſible to be loſt. 2. If the firſt ground of objection is a good one, it ſerves to illuſtrate and ſtrengthen the ſecond. For the contract in that caſe muſt ſuppoſe, either that the judges are ſo ignorant of the laws as not to know them, or, knowing them, are wicked enough to decide againſt their knowledge. A propoſition therefore which draws with it ſo odious and diſgraceful a conſequence, is in itſelf ſo ſhamefully indecent and diſreſpectful, that it ought not to be countenanced or upheld.

Lord *Mansfield*.—This caſe muſt be decided upon the ſtate of it as it appears upon the declaration. It is there ſtated to be a wager made by the defendant who was the party appealing in a cauſe depending before the Houſe of Lords; and who, in caſe the judgment was reverſed in his favour, was to pay 50*l.* to the plaintiff; if it was affirmed, he was to receive 50*l.* He was willing therefore to receive ſomething if he loſt by the deciſion, and to pay the ſame ſum if the judgment were in his favour: The chances therefore were equal.

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The queſtion upon this ſtate of it is, Whether this contract is againſt law, and void upon the face of it?

It is admitted by the counſel for the defendant, that the contract is againſt no poſitive law: It is admitted too, that there is no caſe to be found which ſays it is illegal: But it is argued, and rightly, that notwithſtanding it is not prohibited by any poſitive law, nor adjudged illegal by any precedents, yet it may be decided to be ſo upon principles; and the law of *England* would be a ſtrange ſcience indeed if it were decided upon precedents only. Precedents ſerve to illuſtrate principles, and to give them a fixed certainty. But the law of *England*, which is excluſive of poſitive law, enacted by ſtatute, depends upon principles; and theſe principles run through all the caſes according as the particular circumſtances of each have been found to fall within the one or other of them.

Contracts not prohibited by *poſitive law*, nor adjudged illegal by *precedent*, may nevertheleſs be *void* as againſt *principles*.

The queſtion then is, Whether this wager is againſt *principles?* If it be contrary to any, it muſt be contrary either to principles of *morality*; for the law of *England* prohibits every thing which is *contra bones mores*; or, it muſt be againſt principles of *ſound policy*; for many contracts which are not againſt morality, are ſtill void as being againſt the maxims of ſound policy.—With reſpect to the firſt queſtion, Whether it is againſt morality? This contract is equal between the parties; they have each of them equal knowledge or equal ignorance: and it is concerning an event which, reaſoning by the rules of *Predeſtination*, is to be ſure ſo far certain, that it muſt be as it ſhould afterwards happen to be. But it is a future event equally uncertain to the parties, whether the Houſe of Lords would be of the ſame or of a different opinion with the Chancellor; the preſumption, if any, rather againſt the perſon betting in oppoſition to the Chancellor's judgment.

No doubt there may be a wager of this kind under ſuch circumſtances as would render it immediately immoral, and change it into a crime; and of theſe there are ſome in the books; as in evaſions of ſimony, where a perſon who wanted to be made a Biſhop, converſing with the perſon who had moſt intereſt at Court upon the ſubject of a ſee that was then vacant, ſaid, "I will bet you ſo much, naming a conſiderable ſum, "that I have not the biſhoprick." This was a mere colour to diſguiſe what was the real intention of the party, which was, to purchaſe it. The contract in that caſe was clearly and manifeſtly corrupt, and therefore void. So if the preſent wager had been made with one of the Judges or with one of the Lords, it

1774. would have been a bribe. Or if it had been as Mr. *Dunning* ſtated it, merely a colour to cover uſury, then, notwithſtanding the diſguiſe of the wager, the moment the truth appeared it would remain to be governed by principles, as if the parties had really entered into ſuch a corrupt agreement. Again, if it had been a wager laid with either the attorney or counſel in the cauſe, it would have been an objection. But there is no fact of that ſort in this caſe; which is a tranſaction, that, as far as I can ſee, contains nothing either immoral or contrary to juſtice. As to the certainty of the law mentioned by Mr. *Dunning*, it would be very hard upon the profeſſion, if the law was ſo certain, that every body knew it: the misfortune is that it is ſo uncertain, that it coſts much money to know what it is, even in the laſt reſort.

JONES *verſus* RANDALL.

The ſecond queſtion is, Whether this contract is againſt ſound policy? And ſuppoſing it clear of all the circumſtances beforementioned, ſuch as its being upon equal terms, without fraud, and with a view only of ſecuring ſomething to the appellant, in caſe the deciſion went againſt him, I profeſs that, even independent of thoſe circumſtances, I ſee no objection to it in ſound policy. From my own memory of this cauſe, if there ever was uncertainty in any caſe it was in this.

When a nice queſtion therefore is depending, it may be a point upon which even perſons in the profeſſion may differ; and if either they or any two other perſons bet about the deciſion, provided there be no fraud or colour in the caſe, I ſee no reaſon why they ſhould not do ſo. The preſent caſe being of that ſort, and not being prohibited by any poſitive law nor contrary to any principle of ſound policy or morality, I do not think we are at liberty to prevent the plaintiff from bringing his action to recover the money he has won, and therefore I am of opinion that the rule for arreſting the judgment ought to be diſcharged. The three other Judges concurred.

*Tueſday, April* 26th.

## STATHAM *verſus* BELL.

Deviſe to a *ſon* of which the teſtator ſuppoſed his wife to be *enſient* at the time of making his will, *when he ſhou'd attain the age of* 21 *years*, but if a *daughter*, then one *moiety* of his eſtate to his *wife*, and the other moiety to his *two* daughters (there being one alive at that time) when they ſhould attain their ages of 21, with ſurvivorſhip as between the daughters: if both die before 21, their moiety to go to the wife and her heirs for ever; if ſhe died, *her ſhare* to go *to them*. The wife proved *not* to have been *enſient*: the teſtator died, and ſo did the *daughter* without iſſue and *under age*. The wife ſhall take the *whole eſtate*.

THIS was a caſe out of Chancery upon the conſtruction of a will; the ſubſtance of the facts ſtated was as follows: "That ——— *Statham* being ſeiſed in fee of the meſ-

"ſuages

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" ſuages in queſtion, made his will, by which, among other " things, he there ſays:—Whereas my wife is now pregnant, " if ſhe bring forth a ſon, I will that he ſhall inherit my eſtate " at twenty-one years old; paying 4 *l.* a year to my wife and " 30 *l.* a year to my daughter, at her coming to the age of twenty- " one years, and 10 *l.* more to her on the death of my wife: " but if it be a daughter, I give one moiety to my wife, and " the other to my two daughters to be divided between them, " and to be given them at the age of twenty-one years. If " either die before that time, the ſurvivor to have her ſiſter's " ſhare: if both die before that time, I give both their ſhares " to my wife and her heirs for ever. If ſhe die, then I give her " ſhare to my two daughters. The teſtator died leaving his " widow and an only child, a daughter; the teſtator's wife " was not enſient at the time of making the will, nor at the " time of the teſtator's death. The daughter died under age, " and without iſſue.—The queſtion ſtated for the opinion of " the court was, whether the wife took any, and what eſtate " under this will, no child being born?"

Mr. *Kenyon* for the plaintiff.

The ſingle queſtion is, whether it was the intention of the teſtator, that in the event which has happened the wife ſhould take the whole eſtate? He inſiſted ſhe ſhould not, but upon the precedent condition expreſſed in the will, *viz.* the birth of a ſecond daughter, and the death of both without iſſue, which condition was not performed, and therefore ſhe could not be entitled. For if a ſon had been born, he was to take the whole eſtate, ſubject to the incumbrances charged upon it. If a daughter, one moiety only was to go to the wife, and the other moiety to the two daughters, and if both daughters died without iſſue, then the wife was to have the whole; therefore he did not intend that in *all* events the eſtate ſhould go to his wife; but only upon a *particular* contingency, which contingency has not happened. *Comberbach* 437. *Eſtcott* verſus *Warry*.—*S. C.* 2 *Eq. Caſ. Abr.* 361. under another name. " Deviſe of a term to " an infant in *ventre ſa mere*, if it ſhould be a ſon; and if it " ſhould be a ſon and die under age, then to the teſtator's grand- " ſon. It proved a daughter, and it was adjudged upon ſpecial " verdict, that the executrix, and not the grandſon, ſhould " have the term; becauſe the grandſon was not to take, but upon " a precedent contingency, *viz.* the birth of a ſon, which did not

" hap-

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" happen." So here the precedent condition, *viz.* the birth of a daughter, has not happened, and therefore the wife is not entitled.

Again 2 *P. Williams* 390. *Davis* v. *Norton.* " Deviſe to *B.* " in tail general, and if *B.* die without iſſue in the life-time " of the teſtator's wife, then the wife to have the premiſſes for " life, remainder to *C.* in fee. *B.* dies without iſſue, but the " teſtator's wife dies before *B.* Adjudged by *Reynolds* Juſtice, " that the remainder limited to *C.* is a contingent remainder, " depending upon the death of *B.* without iſſue in the life of " the teſtator's wife; and as that contingency never happened, " the remainder which depended thereon could never ariſe." So here, the limitation to the wife depended upon the birth of a daughter, and the death of ſuch daughter without iſſue, but that contingency has not happened, and therefore the wife cannot be entitled.

Both the above caſes are exactly in point. The caſe of *Jones* verſus *Weſtcomb* may be cited againſt the plaintiff; but in that caſe there was an immediate bequeſt to the wife: here there were contingencies to ariſe firſt; neither of which have happened.

Mr. *Davenport* for the defendant *contrà.*

Upon the natural conſtruction of the words of this will, it was clearly the manifeſt intention of the teſtator not to leſſen the benefit of the wife if ſhe ſhould prove not to have been enſient; but in caſe he ſhould die leaving no ſon, or a daughter or daughters who ſhould not ſurvive his wife, or leave iſſue, then that his wife ſhould take the whole eſtate. If ſo, in the event which has happened, ſhe is clearly entitled notwithſtanding the contingency, upon which the ſubſequent limitation was to ariſe, has not taken place. There are many caſes where words full as conditional and contingent as the preſent have nevertheleſs been conſtrued to be words of limitation. So was *Holcroft*'s caſe, *Moore*, 486, 7. " Deviſe to the uſe of the firſt ſon of Sir *John* " *Holcroft* in tail, and ſo to the ſecond, third, and fourth ſons " ſucceſſively. And if it fortune the ſaid *fourth* ſon to die " without iſſue, remainder over to *Hamlet Holcroft* with di- " vers limitations over:" Sir *John Holcroft* never had but *one* ſon. The queſtion was, whether the ſubſequent uſes could ariſe? and it was held by the court that they could, for the words amount to no more than a limitation of the eſtate; and are not a condition precedent to the eſtate of *Hamlet.* *Jones*

verſus *Weſtcomb.* *Prec. Chan.* 316. 3 *Lev.* 125. 2 *Str.* 1092. to the ſame point. And he obſerved there were repeated inſtances in which words of condition have been conſtrued as limitations inſtead of contingencies; the lateſt in point of time is *White* verſus *Barber*, *Eaſter* term 1771: there the deviſe was, to ſuch child or children as the teſtator's wife ſhould happen to be enſient with at the time of his death: The teſtator had only one ſon at the time of making his will; two were born after the will was made, and before his death: but his wife was not enſient at the time of his deceaſe; yet the court held, "it "was manifeſtly his intention to comprehend all the children "which ſhould be born of his then wife, whether before, or "after his deceaſe."—In the preſent caſe, the intention is apparent, that if a ſon had been born, he was to take the eſtate, but in caſe of a daughter and general failure of iſſue before 21, the wife was to take the whole. In either event therefore the deviſe in the preſent caſe would take place; as an executory deviſe, if the contingency had happened, or as an immediate limitation upon the contingency which has failed. 1774. STATHAM *verſus* BIZE.

The court took time to adviſe.

Afterwards, on the 16th of *May*, Lord *Mansfield*, having firſt ſtated the caſe at large, delivered the unanimous opinion of the court as follows:

"Our opinion is in theſe words: It was the plain intention "of the teſtator, that in caſe no ſon ſhould be born, and he "ſhould have no daughters who ſhould live to the age of twenty-"one years, that the wife ſhould have the whole eſtate: and in "the event which has happened ſhe is ſo entitled."

His Lordſhip added, that the facts of this caſe differed from the famous caſe of *Jones* verſus *Weſtcomb*. For here it was clear, that if the teſtator had died during the pregnancy of his wife, the eſtate would have deſcended to the heir at law in the mean time.

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## GOODTITLE ex dim. HART *verſus* KNOT.

*Tueſday, April* 26th. Deviſe of particular lands in aid of the teſtator's perſonal eſtate, to truſtees, *for the payment of debts*, legacies, and funeral expences, "*All the reſt, reſiduc, and remainder* of his real and perſonal *eſtate* to his wife, her heirs, executors and adminiſtrators."—The perſonal eſtate is ſufficient. The *lands deviſed in aid*, paſs to the wife under the *reſiduary clauſe*. So if the perſonal eſtate had proved deficient in *part* only, the wife would have been entitled to the remainder.

THIS was an ejectment brought to recover certain lands in the pariſh of *Alderchurch* in the county of *Lincoln*, to which the leſſor of the plaintiff claimed to be entitled as

heir

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GOOD-TITLE *ex dim.* HART *verſus* KNOT.

heir at law of *James Humberton*: And on the trial a verdict was found for the plaintiff, for a moiety of the premiſes in queſtion.

Upon a motion to ſet aſide this verdict, it was ordered by conſent of parties, that the verdict ſhould be ſubject to the opinion of the court upon the following caſe:

"The teſtator *Humberton* being ſeiſed in fee of the premiſes "in queſtion, and of other lands, partly in poſſeſſion, and "partly in reverſion, after the death of his wife; by his will, "after ſeveral precedent deviſes and bequeſts, gave and de-"viſed as follows:" "In caſe my perſonal eſtate, excluſive of "ſuch part thereof as I have before given and bequeathed to my "wife, ſhall not be ſufficient to pay all my debts, legacies, and "funeral expences; I hereby give to *Matthew Kenrick* and "*William Reeve* and their heirs, all my lands and eſtates at "*Alderchurch* in the county of *Lincolnſhire*, UPON TRUST to "ſell and diſpoſe of the ſame as ſoon as conveniently may be "after my deceaſe; and the money ariſing from ſuch ſale, I "will and direct ſhall go, and be applied towards making "good any deficiency as ſhall happen in my perſonal eſtate; "and if after ſuch ſale the money ariſing thereby ſhall in any "reſpect be deficient, I do then ſubject and make liable the "reverſion of my lands ſettled in jointure upon my wife to make "good the ſame. The teſtator concludes thus: And laſtly, all "the *reſt*, *reſidue*, and remainder of my real and perſonal eſtates "whatſoever and whereſoever, I give, deviſe, and bequeath to "my ſaid dear and loving *wife*, her heirs, executors, and ad-"miniſtrators; and I conſtitute her my ſole *executrix*."

The teſtator died ſoon after, without altering his will, leaving the leſſor of the plaintiff, and *William Blunt*, his heirs at law.—After his death the will was proved, and out of his *perſonal* eſtate all his *debts* and *legacies* were *paid*, and there was no occaſion to call in the aſſiſtance of the real eſtate. The queſtion was, "Whether the plaintiff as co-heir was entitled to recover "the lands and eſtate at *Alderchurch*?"

Mr. *Wilſon* for the plaintiff. The queſtion depends upon, Whether the teſtator intended to compriſe the premiſes in queſtion in the reſiduary clauſe? He argued that the teſtator did not intend to compriſe them, and if he did not, then the widow is not entitled, but they deſcend to the heir at law. He cited *Roe* verſus *Freed*, *Forteſcue* 184. and *Wright* verſus *Hall*, there cited, and 1 *P. Will.* 302.

Mr.

Mr. *Cuſt* for the defendant. Upon the whole will there is no title in the heir at law: For the intention of the teſtator is clear, that his heir at law ſhould not have the eſtate. In *Roe* v. *Flood* it was held, that the eſtate did not paſs under the reſiduary clauſe, becauſe it was a *lapſed deviſe*; and the court ſaid, that reſidue muſt be expounded to mean reſt and reſidue of the teſtator's lands undeviſed at the time of making his will, not, at the time of his death. But the queſtion in this caſe is, whether lands deviſed upon a contingency which never happened, ſhall paſs by this reſiduary clauſe? In ſupport of which, he cited *Sprigg* v. *Sprigg*, 2 *Vern.* 394. deviſe of lands to executors to be ſold, and thereout to pay 500 *l.* to *A.* if he return from beyond ſea; the reſidue to *B.* *A.* died before the teſtator. *Per* Lord *Keeper*: The deviſe of 500 *l.* to *A.* if he be living, and ſhall return from beyond ſea, is a contingent deviſe and on a condition precedent, which not happening, is as if never given. *Bethel* v. *Holmden* in *canc. Mich.* 1772. *Jones* v. *Weſtcombe* to the ſame point. But, he relied on the caſe of *Cliffe* v. *Gibbons*, 2 Lord *Raym.* 1324. as a caſe in point. There, *A.* by will directed all his debts and funeral expences to be paid as ſoon as conveniently could be after his death, and gave a power to his wife to ſell, if need be, his lands, &c. for that purpoſe, and then to pay his legacies, amongſt which he gave one of 1000 *l.* to his wife, and the reſidue of his eſtate after debts and legacies paid he gave to his wife. Lord *Cowper* was clearly of opinion that a fee paſſed by the deviſe of all the reſt and reſidue to the wife after payment, &c.

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Lord *Mansfield* after ſtating the caſe ſaid, I think this an exceedingly plain caſe. There are two lights in which it may be conſidered: *Firſt*, Whether in the event which has happened there is any deviſe at all of the premiſes in queſtion? If there is not, they go by the reſiduary clauſe to the widow; for there are other eſtates deviſed; ſo that reſt and reſidue is applicable to the other eſtates that are ſo deviſed: and I am of opinion that they certainly are not deviſed at all; for the teſtator ſays, "In *caſe* my perſonal eſtate ſhall not be ſufficient, *then* I deviſe "&c." He dies; his perſonal eſtate is more than ſufficient; therefore he has deviſed nothing.

But *Secondly*, I will ſuppoſe the perſonal eſtate had been a little deficient, and that there had been occaſion to make uſe of this deviſe to pay part of the debts, and that in conſequence

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of it they had been diſcharged. In the caſe I have put, the deviſe would have once taken effect, and there would have been a *reſulting* truſt for ſomebody, ſubject to the charge ſo brought upon it. The queſtion would then be, whether in this caſe the heir at law could recover? One objection which has been taken is that the *legal* eſtate is in the *truſtees*, and therefore the *heir* at law cannot recover in this ejectment. In anſwer to that objection it has often been determined that an eſtate in truſt merely for the benefit of the *ceſtuy que truſt*, ſhall not be ſet up againſt him; any thing ſhall rather be preſumed: nor ſhall a man defend himſelf by any eſtate which makes part of the title of the leſſor of the plaintiff. Now if the truſtees had paid this charge, they would then have become truſtees for the perſons entitled to the *ſurplus* after ſuch payment. Therefore if the heir at law be that perſon, the objection being upon a ground which makes part of his title, it ſhall not be ſet up againſt him. The queſtion therefore turns ſingly upon the conſtruction of the will. Let us ſee then what the deviſe in the will is? It is a truſt originally, and in ſubſtance a charge on land; which land is deviſed ſubject to raiſe by ſale or mortgage as much money as is neceſſary for the payment of debts, legacies, and funeral expences. It is therefore in ſubſtance and equity a deviſe of a charge upon the eſtate; which may be diſcharged by payment of the incumbrance upon it: or, if not wanted, will reſt in the ſame ſtate as if it had not been made ſubject to ſuch incumbrance. This brings it very near the caſe of *Cliffe* v. *Gibbons*, 2 Lord *Raym.* 1324-5. It is land before deviſed upon which a perſonal charge is let in; therefore the words, "All the reſt of the land," neceſſarily make it come within the reſiduary clauſe. If it had been ſold, after payment of what was wanted, the reſt of the money ariſing from ſuch ſale of courſe muſt go to the perſon, to whom under the reſiduary clauſe the land was to go, ſubject to ſuch payment and diſcharge. Therefore in either caſe the widow is entitled. The three other judges concurred.

*Per Cur.* Poſtea delivered to the defendant.

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## MEASE, Executrix, *verſus* MEASE.

*Tueſday, April 26th.*

Debt upon a bond, conditioned for payment at a certain day. Plea, that it was given as an indemnity to the plaintiff's teſtator againſt another bond, bad.

THIS was an action of debt upon bond conditioned for payment at a certain day. Plea, that it was given as an indemnity to the plaintiff's teſtator againſt another bond, and not damnified. Demurrer.

The Queſtion was, Whether the agreement ſtated in the plea could be given in evidence againſt the expreſs condition of the bond?

Mr. *Wilſon* for the plaintiff. The plea is clearly bad, and the agreement cannot be given in evidence; it being ſettled that no parol evidence can be given to abate or extend a bond or deed. Lord *Bacon's Elem. Law, Regula* 23. *p.* 82. *Cro. Eliz.* 697. 1 *H.* 7. 16. 8 *Co.* 155. *Fitzg.* 73. 2 *Wilſ.* 347. *Meres* v. *Anſell*, reported ſince in 3 *Wilſ.* 275.

Mr. *Davenport* contrà. The plea is founded in truth and fact.

Lord *Mansfield* interrupted him. If the fact is true, it is a proceeding by the plaintiff contrary to the agreement, and the court would incline to get at it in another form. I think therefore it would be better to make a motion to ſtay proceedings upon affidavit, and let it ſtand over; if upon motion the court ſhould be againſt the defendant, he muſt pay coſts, and judgment upon the demurrer ſhall be final. The plea is clearly bad.

After ſome aſſertions from the attorney for the plaintiff, Lord *Mansfield* ſaid, let there be judgment for the plaintiff.

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## COLTON *verſus* SMITH.

*Wedneſday, April 27th.*

Preſcription as lord of the manor for toll of all goods landed *within* the *manor*, in conſideration of *repairing* a *wharf* within the manor, not confining it to the wharf, is good.

THIS was an action for a toll for a wharf in *Gainſborough*. One count in the declaration ſtated, that the plaintiff was lord of the manor, and that he and all thoſe, *&c.* had immemorially uſed to keep and repair a wharf within the manor; and, in conſideration thereof, had received toll of all goods landed within the manor; not confining it to the wharf. There was another count claiming a toll without ſtating any conſideration at all. Verdict for the plaintiff.

Serjeant *Hill* had moved in arreſt of judgment, becauſe the conſideration ſtated in the firſt count was inſufficient in law; and a conſideration

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COLTON *verſus* SMITH.

conſideration being expreſſed, the court would not preſume any other than the conſideration ſo ſet forth.

Mr. *Wallace* now ſhewed cauſe. The caſe of *Criſpe* v. *Bellwood*, 3 *Leo.* 424. is preciſely this caſe. The plaintiff's anceſtor there claimed the very toll in queſtion, exactly upon the ſame ground of conſideration, and the court then held it was a good one. Only two caſes have occurred ſince. *Wilkes* v. *Kirby*, 2 *Lutw.* 1519. in which caſe there was no deciſion, but only a *quære* made by C. J. *Treby*: 2dly, *Trueman* v. *Walgham*, 2 *Wilſ.* 293. which was clearly a caſe of toll thorough; and therefore diſtinguiſhable from the preſent toll, which being claimed upon all goods landed within the manor, in conſideration of *repairing* a public wharf, is in the nature of a toll traverſe, where no conſideration in fact is neceſſary.

In toll traverſe no conſideration is neceſſary.

Serjeant *Hill* agreed, that the caſe in 2 *Wilſ.* 293. was a toll thorough, where a conſideration was neceſſary to be laid; and admitted that in a toll traverſe, as here, no conſideration was neceſſary, becauſe it is implied. But he inſiſted that as the plaintiff had thought fit to lay a conſideration and to make it part of his preſcription, the conſideration, as laid, ought to be ſufficient in law: but this was not; for no conſideration is binding upon a third perſon unleſs he receive the benefit of it, and here every body who pays has not the benefit of it. As to the caſe in 3 *Lev.* 424. it is not this toll; and that caſe is no where reported, or even cited, but in 2 *Lev.* 96.

Lord C. J. *Treby* in *Lutwytche* makes a *quære* if ſuch a conſideration be good.

Lord MANSFIELD. In this caſe every body that pays *has* a benefit; for if they go to the wharf they have the benefit of it, and if they land their goods elſewhere within the manor, they land upon the plaintiff's private property. The *quære* made by Lord Ch. J. *Treby*, in *Lutwyche*, is rather againſt the defendant here; for it is, *quære* if *not* well alleged, and the plea good? Which ſhews he inclined to think it was. In the preſent caſe the landing is upon the plaintiff's private property, and in 3 *Lev.* 424. the court held the conſideration good.

The three other judges concurred. *Per Cur.* Judgment for the plaintiff.

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*Friday, April 29th.*

## BURTENSHAW *verſus* GILBERT.

One having made his will and a duplicate thereof, delivers the duplicate to *A.* afterwards he makes another will, by which he revokes all former wills, and at the ſame time *cancels* that part of the *former* will which was in his *own* cuſtody. Before his death he ſends for an attorney to make a *third* will, but is ſenſeleſs before he arrives. After his death, the *firſt* and ſecond will are found *together* in a paper *both cancelled*; but the *duplicate* of the firſt is found *uncancelled* amongſt his other deeds and papers. The act of *cancelling* the *latter* will does not *ſet up* the *duplicate* of the *former*.

THIS was an action of treſpaſs: Plea 1ſt. Not guilty: 2d. A juſtification under an authority from *Joſeph Calverly* the ſurviving deviſee of the lands in queſtion, under a will made by *Nicholas Newenden* dated 7th *Auguſt* 1759, upon the validity of which will iſſue was taken.

The cauſe was tried at the laſt *Lent* aſſizes for *Suſſex*, when a verdict was given for the plaintiff, ſubject to the opinion of the court upon a caſe ſtated, the ſubſtance of which was as follows:

That *Nicholas Newenden*, on the 7th of *April* 1759, duly made and executed his laſt will and teſtament, and at the ſame time executed a duplicate. *At the time* of making his will of 1759, he told one of the witneſſes that the will was made in order to make his wife eaſy. Afterwards, he ſaid it was not a will to his liking, and that he ſhould alter it if he lived. *Nicholas*'s wife died ſoon after: That the teſtator, upon the 7th of *May* 1761, fetched one part of the old will down ſtairs to have it altered, and then duly made another will of that date: In this will the deviſes were different from thoſe in the will of 1759*. That *Nicholas*, after executing this latter will, took the ſaid one part of the old will in his hands, tore off his name and ſeal, and directed Mr. *Sampſon*, the perſon who had made the new will, to cut off the names of the witneſſes to the old one; which he did in the teſtator's preſence: and at the execution of this ſecond will, he ſaid, he made it in order to give *Mary Engliſh*, a deviſee in the firſt, a greater portion; for otherwiſe Mrs. *Weſton*, another deviſee in the firſt, would have more than her ſhare. That he delivered this latter will to Mr. *Sampſon*, who lived at about twenty miles diſtance, deſiring him to carry it to his houſe and keep it; at the ſame time, he aſſigned as a reaſon for ſuch requeſt, that if his heir at law *Ann Newenden*, or his daughter *Weſton*,

* *N. B.* The bequeſts themſelves made no queſtion in the caſe; the only material circumſtance was, that the deviſes in the latter will, varied from thoſe in the former.

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should find it, they might destroy it. Said there was a duplicate of the will of 1759, in Mrs. *Weston*'s custody; but would keep *this*, meaning his last will, as private as he could. Mrs. *Weston* lived about ten miles distant from the testator, but was in the house when the searches were made after his death. That *Anne Newenden* lived with the testator, and was about eighteen years old when he died. That *Mary English* died in the life-time of the testator. That, sometime after her death, he sent to Mr. *Sampson* the following note—"Sir, I pray you to "send me the will which you have of mine."—A second note was sent on the 14th of *April* 1762.—"Pray send me the will by "the newsman."—That, in consequence of this note, *Sampson* sent back the will of 1761 to the testator, who, before his death, sent to Mr. *Wheeler* an attorney, to come and make another will; who accordingly came in about an hour's time; but the testator had then lost the use of his senses, and died on the 28th of *December* 1762. That two searches were made in the testator's cabinet and boxes after his death, the keys of which were in *Anne Newenden*'s possession; and *one part* of the will of 1759, and the will of 1761, were found *together* in a paper, both cancelled. The *other* part of the will of 1759 was found *uncancelled* in the testator's room, amongst other deeds and papers.

The question for the opinion of the court upon these facts, was, "Whether the testator died intestate or not; that is, "Whether the will of 1759 was revoked?"

For the plaintiff, who claimed under the heir at law, it was insisted, that the will of 1759 was absolutely and completely revoked by the act of the testator in cancelling that part of it which was in his custody, notwithstanding the duplicate remained whole and uncancelled: And so it was held in Sir *Edward Seymour*'s case, cited by Lord *Cowper*, in *Onions* versus *Tyrer*, 1 *P. Wms.* 346. 2 *Vern.* 743. *Secondly*, being a *duplicate* only of a will already *cancelled*, it cannot be set up again, but by an *actual republication*: For, since the statute of frauds, there can be no such thing as an *implied republication*. 2 *Eq. Cas. Ab.* 768-7. marginal notes: *Com. Rep.* 383-4. cited *arg.* in *Acherley* versus *Vernon*. 3 *Bur.* 1496. 1 *Ves.* 191. 1 *Wils.* 310. In the present case, not only no *act* of republication is stated, but no *appearance* of any *intention* in the testator to re-establish his first will, can be collected from the facts found: On the contrary it is manifest, that he was uniformly dissatisfied with the disposition he had there made, from the time he executed it

[illegible] hour of his death

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For the defendant *contra*: That the will of 1759 was *not revoked*. For the caſe ſtates that the will of 1759 was a *ſubſiſting will* at the time of the teſtator's death, and in his own poſſeſſion at that time. It is found likewiſe, that the will of 1761 was cancelled. By that act therefore, the will of 1759 is again ſet up, notwithſtanding the clauſe in the will of 1761, revoking all former wills. This doctrine is expreſsly laid down in *Glazier* verſus *Glazier*, ſince reported in 4 *Bur.* 2514.—"Teſtator made two wills; both found to have been in his cuſtody at the time of his death.—The *ſecond* was *cancelled*, the *firſt*, *uncancelled*.—It was there argued, that the act of *making* the *latter*, was a *revocation* of the *former*, and the *ſecond* being *cancelled*, the teſtator muſt be held to have died inteſtate. But, *per cur.* "Such revocation is itſelf *revocable*, and being *cancelled* by the teſtator, it has no effect; no operation at all: "The *firſt* will therefore ſtands good."

With regard to the queſtion, whether the cancelling of one part of a will is a cancelling of the duplicate, in ſome caſes it may be ſo held; as where the duplicate is in the poſſeſſion of a perſon whoſe intereſt it might be to keep it from the teſtator, or where there is an actual withholding it from him, or where neceſſary impediments lie in his way, and prevent his gaining the poſſeſſion of it.—But in the preſent caſe, it is expreſsly ſtated that the uncancelled part was found among the teſtator's other deeds: He had therefore full power to deſtroy or preſerve it; and having done the latter, with the knowledge of the ſecond being cancelled, it is ſtrong evidence that he meant it ſhould ſtand as his laſt will.

The circumſtance of the firſt will being cancelled, makes no alteration, but it is equally revived by the ſecond being cancelled: and ſo it was held in *Onions* verſus *Tyrer*. 1 *P. Wms.* 345. reported likewiſe in 2 *Vern.* 743. and *Pre. Chan.* 459.—'One made his will.—Afterwards he made a ſecond will, by which he revoked all former wills, and directed the firſt to be *cancelled*, which was accordingly done: This latter will was not duly atteſted to paſs real eſtates. The queſtion was, "whether under theſe circumſtances the teſtator did not die inteſtate?" But the court held that the ſecond will not being duly atteſted, was a nullity, and did not revoke the former, which therefore was good.' The preſent however is a much ſtronger caſe: For here there was a *deliberate cancelling* of the

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Again, it is clear from the facts found in the ſpecial verdict, that the teſtator never intended to die *inteſtate*, which is *material*, as againſt the claim of an *heir* at law; and ſo was Lord *Cowper's* opinion in the caſe of *Onions* verſus *Tyrer*, 1 *P. Wms.* 345. before cited; where he ſays, "tho' the firſt will was ordered by the teſtator to be cancelled, and the ſame was in fact cancelled, yet all this being upon a preſumption that the latter will was good and duly executed, it is properly *relievable* under the head of accident." 1 *P. Wms.* 345.

It was ſuggeſted that the parties were willing to have a ſecond argument, if the court entertained any doubt.

Lord *Mansfield.* I believe we none of us have the leaſt particle of doubt in this caſe. I ſee no new light that can be thrown on the ſubject; there is no caſe in point; and the principles of law are clear enough. Since the ſtatute of frauds, a will cannot be revoked, but by an inſtrument executed according to the ſolemnities required by that ſtatute; or by burning, cancelling, tearing, or obliterating the ſame by the teſtator himſelf, or by his directions.

The mere act of *cancelling* a will is no *revocation*, unleſs done *animo revocandi.*

With reſpect to the *revocation* of a will by the act of *cancelling*, it is in itſelf an equivocal act; and, in order to make it a revocation, it muſt be ſhewn *quo animo* it was cancelled. For, unleſs that appears, it will be no revocation. As, if a man were to throw the ink upon his will, inſtead of the ſand; tho' it might be a complete defacing of the inſtrument, it would be no cancelling; or ſuppoſe a man, having two wills of different dates by him, ſhould direct the former to be cancelled; and through miſtake the perſon ſhould cancel the latter: ſuch an act would be no revocation of the laſt will: or ſuppoſe a man, having a will conſiſting of two parts, throws one unintentionally into the fire where it is burnt; it would be no revocation of the deviſes contained in ſuch part. It is the intention, therefore, that muſt govern in ſuch caſes; and that was the ground of the determination in the caſe of *Onions* verſus *Tyrer*, 2 *Vern.* 743. upon the mention of which, in the argument, I thought that ſomething remained, which was not ſtated. The whole queſtion there turned upon the *act* of *cancelling*, being under a *miſtake.* Indeed there was ſome doubt upon the evidence, whether the firſt will was cancelled at all: But Lord *Cowper* there ſays, ſuppoſing the firſt will had been cancelled, the teſtator did

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did not mean to do ſo: Why? becauſe the deviſes in the ſecond will were preciſely the ſame as thoſe in the firſt, and to the ſame perſon. He did it therefore upon a ſuppoſition, that he had executed the latter according to the ſtatute of frauds; not with a deſign to revoke the deviſes as to the real eſtate. It is clear, therefore, that the ground of the determination in that caſe, was, its being a *cancelling* by *miſtake*; not that the firſt will was revived for want of the latter being duly ſubſcribed by the witneſſes. The books make Lord *Cowper* add (which would perhaps be difficult to maintain) "that even though the *law* held this to be a *revocation*, yet, under the head of *accident*, a court of equity would relieve." To be ſure, in order to explain any ſuch act of cancelling, tearing or defacing, *&c.* as I have before mentioned, parol evidence muſt be let in.

But ſee how ſtrong a caſe the preſent is, as to the teſtator's *intention* to revoke. At the very time of making his firſt will, he expreſſes his diſſatisfaction at it; and adds, that he meant to alter it if he ſhould ſurvive his wife, becauſe Mrs. *Weſton* would take more under it than he intended ſhe ſhould do. He perſiſts in the ſame intention after the death of his wife, and executes it by a new will in 1761, which is a complete, legal, and effectual will; and if he had died immediately after, whether he had cancelled the former, or not, it would have been revoked; becauſe at the end of the ſecond will, there is a declaration by which he revokes all former wills. Beſides this, he deliberately cancels that part of the will of 1759 which he had in his own poſſeſſion; and by the evidence it is clear, that he had not the duplicate in his poſſeſſion at that time; for he mentions that it was in the hands of Mrs. *Weſton*; and the reaſon appears, why he could not well get at it, from the circumſtance that induced him to give Mr. *Sampſon* the care of the ſecond will: namely, that if *Ann Newenden* or Mrs. *Weſton* ſhould get at it they might deſtroy it.

The facts are too many and too ſtrong to admit of a queſtion, but that, at the time of making the ſecond will, the firſt was upon every principle of law clearly revoked, and can never be ſet up again but by a new will. It is however contended, that there are circumſtances which are equivalent in this caſe to a new will; and they are theſe: that *Mary Engliſh*, a favourite deviſee under the will of 1761, died: By her death his intentions under that will were defeated; and being ſo, he had cancelled it. Further, that he had it in view to make a new will, and there-

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fore, there is the ſtrongeſt evidence of his intention not to die inteſtate; but he is ſpeechleſs before he can accompliſh it. Be it ſo: but he had actually cancelled the will of 1759. Why then is the diſpoſition in that to be ſet up in preference to any other, or even to that made under the will of 1761? It does not appear *when* he cancelled the will of 1759, but he did it ſo leiſurely, that he put it up together with the will of 1759; and the reaſon, as it appears, for his doing ſo, was, becauſe he meant to make another will. It ſeems however upon ſearch that the other part of the will of 1759 had come from Mrs. *Weſton*'s, and was found amongſt the teſtator's papers. How did it come there? With what view? Upon what meſſage? Under what circumſtances? Whether the teſtator ſent for it, or not, we are all in the dark. The jury it is true have not found that it was put there after his death, but they have not found how it came there, nor was any thing ſuggeſted about it at the trial. It being therefore in the poſſeſſion of the teſtator, nobody knows how or why, there is no colour for its being ſet up after the former part was cancelled. It is a very ſtrong, and a very plain caſe.

Where there are duplicates of a will, one in the cuſtody of the teſtator, the other not; and the teſtator cancels that which is in *his* cuſtody, it is an effectual cancelling of both.

*Aſton* Juſtice. If the duplicate of the will of 1759 had ſtill remained in the hands of the perſon to whoſe cuſtody it was originally entruſted, yet the cancelling that part which the teſtator had in *his own* poſſeſſion would have been a ſufficient cancelling of ſuch duplicate.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred. *Per Cur.* Let the poſtea be delivered to the plaintiff.

*Tueſday, May* 3d.

Treſpaſs on the caſe lies by a maſter for ſeducing his *journeyman.*

## HART *verſus* ALDRIDGE.

THIS came before the court on a caſe reſerved upon the following queſtion; Whether under the circumſtances of this caſe the plaintiff was entitled to recover?—It was an action of treſpaſs on the caſe for enticing away ſeveral of the plaintiff's *ſervants* who uſed to work for him in the capacity of journeymen ſhoemakers. The jury found that *Martin* and *Clayton* were employed as journeymen ſhoemakers by the plaintiff, but for no determinate time but only by the piece, and had at the time of the treſpaſs laid each of them a pair of ſhoes unfiniſhed; that the defendant purſuaded them to enter into his ſervice and to leave theſe ſhoes unfiniſhed, which they accordingly did.

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Mr. *Darell*, for the plaintiff, ſtated it to be a queſtion of common law, and that the only point for the opinion of the court was, "Whether a journeyman was ſuch a ſervant as the law takes "notice of?" In ſupport of which propoſition he inſiſted that a journeyman is as much a ſervant as any other perſon who works for hire or wages; that neither in reaſon nor at common law is there any diſtinction between a ſervant in one capacity or another, and that the injury of ſeduction is in all caſes the ſame, though the recompence in damages may be different. To ſhew that an action lay at common law for taking a ſervant out of his maſter's ſervice, he cited *Broke Abr. tit. Action ſur le caſe, pl.* 38. 11 *Hen.* 4. 23. *pl.* 46. In *Fitzherbert*, 168. D. it is laid down, that "if a man take an infant or other out of another's "ſervice, he ſhall be puniſhed, although the infant or other were "not retained." In *Brooke*, *tit. Lab. p.* 21. a diſtinction is taken between the taking a ſervant out of his maſter's ſervice, and the procuring him to depart or retaining him after a voluntary departure, being appriſed of his firſt retainer: In the two laſt of which caſes, an action on the caſe is the proper remedy; in the former, treſpaſs, at common law. But he inſiſted that in no caſe had there ever been a diſtinction taken with reſpect to the *time* for which a ſervant might be hired; nor indeed before the ſtat. 5 *Eliz. c.* 4. was any preciſe time neceſſary; the object of which ſtatute was very different from the queſtion before the court. He preſſed the argument *ab inconvenienti*, ſtating that it would be of great detriment to the town, where the whole trade was in a great meaſure carried on by this ſort of ſervant.—That the verdict had found the defendant to be appriſed of the retainer of the ſervants, it being in proof that he had deſired them to leave their work then in hand unfiniſhed.

Mr. *Wilkes contra*. The ſingle queſtion is, Whether the enticing away a journeyman ſhoemaker, who is hired to make a ſingle pair of ſhoes, is ſuch an injury to his maſter as that an action will lie for it? Now the jury have found that there was no hiring for any determinate time, but only by the piece: If ſo, they could not be the plaintiff's ſervants; for the term 'journeyman' does not import that they belong to any particular maſter.

Lord *Mansfield* interrupted him. The queſtion is, Whether ſaying that ſuch a one is a man's journeyman, is as much as to ſay, that he is ſuch a man's ſervant; that is, whether the jury by finding him to be the plaintiff's journeyman do not *ex vi termini* find him to be his ſervant? A journeyman is a ſer-

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vant by the day; and it makes no difference whether the work is done by the day or by the piece. He was certainly retained to finiſh the work he had undertaken, and the defendant knowingly enticed him to leave it unfiniſhed.

What is the giſt of the action? That the defendant has enticed a man away who ſtood in the relation of ſervant to the plaintiff, and by whom he was to be benefited. I think the point turns upon the jury finding that the perſons enticed away were employed by the plaintiff as *his* journeymen. It might perhaps have been different if the men had taken work for every body, and after the plaintiff had employed them the defendant had applied to them, and they had given the preference to him in point of time. For if a man lived in his own houſe and took in work for different people, it would be a ſtrong ground to ſay that he was not the journeyman of any particular maſter: But the giſt of the preſent action is, that they were attached to this particular maſter.

*Aſton* Juſtice. It is clear that a maſter may maintain an action againſt any one for taking and enticing away his ſervant upon the ground of the intereſt which he has in his ſervice and labour. And even ſuppoſing, as my Lord has ſtated, that the ſervant did live in his own houſe, if he were employed to finiſh a certain number of ſhoes for a particular perſon by a fixed time, and a third perſon enticed him away, I think an action would lie. If not, it might be of very bad conſequence in trade. He is a ſervant *quoad hoc*, and though the ſeducer and enticer is much the worſe, yet the law inflicts a penalty upon workmen leaving their work undone.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred. *Per Cur.* Let the poſtea be delivered to the plaintiff.

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*Tueſday, May* 3d.

## HOWLET and another *verſus* STRICKLAND.

In covenant, unliquidated damages ariſing from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of ſet-off

THIS was an action of covenant. The defendant pleaded that he had ſuſtained greater damages by reaſon of the breaches committed on the part of the plaintiff, than the value of the damages ſuſtained by the plaintiff on account of the breaches alleged in the declaration: all the breaches aſſigned in the plea were for non-delivery of allum in due time. The plaintiff demurred, and for ſpecial cauſe aſſigned, that it was not competent to the defendant to plead theſe damages by way of ſet-off.

Mr.

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Mr. *Chambre* for the plaintiff. The covenant is not for money, therefore the damages cannot be ſet off, either by *ſtat.* 2 *G.* 2. *c.* 22. or 8 *G.* 2. *c.* 24. For they are not debts, nor recoverable as ſuch. A tender is only pleadable to an action of contract for money.

In no part of the plea is it alleged, that theſe are mutual debts. But farther in this caſe, the damages to be recovered upon the covenant, are totally uncertain; the meaſure of them depending upon the diſcretion of the jury. It is impoſſible therefore for the parties to affix any preciſe balance; and conſequently the act of parliament cannot extend to them. If the conſtruction which is contended for on the other ſide, is to prevail, damages upon a breach of marriage contract, might be inſiſted upon as debts: and the ſame reaſoning might extend to the ſetting off damages in an action of trover.

Mr. Serjeant *Walker* for the defendant. By ſtat. 2 *G.* 2. *c.* 22. a defendant is at liberty to ſet off any demand that he may have againſt the plaintiff; or to plead it in bar as the nature of the caſe may require, and by ſtat. 8 *G.* 2. *c.* 24. this power is extended to debts of a different nature.

The preſent action is an action for damages, and the ſet-off is of the ſame nature as the demand; *viz.* unliquidated damages: the verdict therefore will decide the balance. The uncertainty of the damages cannot be a foundation for the diſtinction inſiſted on: for the words of the ſtatute are general, "mutual debts:" and in almoſt all the caſes where a ſet-off is allowed, the balance is uncertain. In an action upon a *quantum meruit*, the very expreſſion ſhews, that the damages are unliquidated: ſo in an action for work or labour done, or for goods ſold and delivered, the damages are unliquidated. No inconvenience can ariſe in the preſent caſe, becauſe theſe damages ariſe upon the ſame inſtrument, and make but one tranſaction: the jury therefore can decide with equal eaſe upon both.

Lord *Mansfield*. I take this plea to be merely for the purpoſe of delay. The act of parliament, and the reaſon of the thing, relate to mutual debts only. Theſe damages are no debts. An *indebitatus aſſumpſit* could not be brought for them.

Mr. Juſtice *Aſhhurſt*. Debts to be ſet off muſt be ſuch as an *indebitatus aſſumpſit* will lie for.

Mr. Juſtice *Aſton*. Clearly an unliquidated demand or uncertain damages cannot be ſet off. Mr. Juſtice *Willes* concurred.

Judgment for the plaintiff.

1774.

*Thurſday, May 5th.*

## REX *verſus* SIR JOHN CARTER.

Information in the nature of a *quo warranto* granted, where the *right* depends upon a matter of *doubtful law*, in order to its being finally determined. The queſtion in this caſe, was, whether an *infant* of nine years old was capable of being elected a burgeſs?

UPON a rule to ſhew cauſe why an information, in the nature of a *quo warranto*, ſhould not be directed to the defendant, to ſhew by what authority he claimed to be a burgeſs of the borough of *Portſmouth*, the ground of the application was, that at the time of his being elected a burgeſs he was an *infant* of the age of nine years only; and therefore incapable of ſerving the office: and the caſe of *Rex* verſus *White*, *caſes temp.* Lord *Hardwicke* 8. was cited. But here it appeared that the defendant was not ſworn in nor ever acted till after he was of age.

Upon ſhewing cauſe, the counſel againſt the rule went very much at large into the doctrine of an infant's capacity to take. But as the court were clearly of opinion that they ought not to decide ſo material a queſtion in this ſummary mode, I ſhall poſtpone ſtating the arguments on this head, till the deciſion of this queſtion upon demurrer, *Mich.* 15 *Geo.* 3. *infra*, 220. when they were repeated.

*Secondly*, they preſſed the ground of long acquieſcence; ſtating that the defendant was elected a burgeſs in 1751, ſworn a burgeſs in 1763; an alderman in *September* 1763: afterwards elected mayor, and no objection made, till the preſent time, when the attempt is to diſfranchiſe *him*, and ſixty other perſons claiming under his election. As to eleven of them it was contended there could be no queſtion; becauſe the mayor, and all the aldermen who were within ſummons were preſent, and all concurred in their election. Amongſt them was Mr. *Barlow* the late mayor. If therefore the mayor choſen under *Carter* was not legal mayor, *Barlow*, agreeable to the terms of the charter, muſt be conſidered as legal mayor; becauſe the charter directs that the mayor muſt hold over until another be duly choſen.

Lord *Mansfield* ſtopped the counſel on the other ſide, as being unneceſſary to ſay any thing.—The only queſtion now before the court is, whether the rule ſhall be made abſolute, that is, whether the cauſe ſhall go to trial.

The only point which ſtruck me as material to be conſidered, was the ſecond ground of objection to the rule; namely, the circumſtances under which this application is made; from which

it

it appears, that if the admiſſion and election had been at the ſame time, the defendant would have been in poſſeſſion above twenty years. But it is ſaid, though a title accrues within twenty years, the court, under circumſtances, will not interpoſe to diſturb the peace of the corporation. In caſes where there has been a long acquieſcence, and where the objection, if it prevailed, might go to diſſolve the corporation, the court might be ſo diſinclined. But here there is no acquieſcence for any conſiderable period of time; and it is admitted on all hands that it will not endanger the diſſolution of the corporation. 1774. REX verſus CARTER.

The objection then turns ſingly upon a point of doubtful law; whether an infant is capable of being elected a burgeſs. This may be a very conſiderable queſtion, and a great deal may be ſaid in favour of their being elected. An infant is capable of purchaſes and privileges that are for his benefit, and amongſt other privileges that of a grant. Suppoſe the king in the firſt charter had nominated an infant one of the burgeſſes: Upon a queſtion whether the nomination was void, it would depend upon circumſtances; and might turn upon the nature of the acts requiſite to be done by the burgeſſes. It may be a queſtion which in its conſequences may more or leſs affect the right of all the corporations in the kingdom. Therefore all theſe grounds operate concluſively to make the rule abſolute. The reaſons urged againſt it are, that there is no precedent which ſupports the application. But two caſes have been cited, in which the reaſon Lord *Hardwicke* aſſigns for ſending the very queſtion now under litigation to be tried, was, that it had never been ſettled. It does not appear that thoſe caſes ever were finally decided. Therefore the court in this caſe adopt the reaſon which weighed with Lord *Hardwicke*, and make the rule abſolute, that the queſtion may receive a full and final determination. As to the election of the eleven being good, upon the ground that if *Carter* was not mayor, *Barlow* was; where a man has no idea that he is acting in a particular capacity, it is the ſame thing as if he was abſent: no authority has been cited to ſhew that ſuch an election would be good; and we cannot in this ſummary way determine that it is. Therefore it is moſt clear that all the rules muſt be made abſolute.

The three other Judges concurred.

1774.

*Saturday, May 7th.*

## REX *verſus* ABRAHAM HALL.

*The coſts to be paid by offenders under ſtat. 6 G. I. c. 48. ſect. 1. muſt be aſcertained by the conviction, or it is bad.*

THE defendant upon a motion to diſcharge him out of priſon, being brought up by *habeas corpus*, and the warrant of commitment returned, it recited, that, "Whereas the defendant "was, upon the complaint of *Edward Ripley*, boatwright, and "upon the oath of, *&c.* convicted before me *John Drage* Eſq; "one of his majeſty's juſtices of the peace, *&c.* in purſuance of "an act of parliament paſſed in the ſixth year of the reign of "his preſent majeſty, for cutting down and carrying away one "aſh timber-tree, that was growing in a drove-way belonging "to an encloſed ground, called a dolver, at *Burwell* aforeſaid, "in the county aforeſaid, the property of *Matthew Deace* of "*Burwell* aforeſaid, gent. without the conſent of the ſaid "*Matthew Deace* the owner thereof. And this being for the "firſt offence, the ſaid *Abraham Hall* was ordered by me, the "ſaid juſtice, to forfeit and pay down the ſum of fifteen pounds, "*together with the charges previous to* and attending ſuch con-"viction: which he refuſed to pay. Theſe are, therefore, in his "majeſty's name, to require you the ſaid conſtable, to convey "and deliver into the cuſtody of the ſaid keeper of the ſaid com-"mon goal, the body of the ſaid *Abraham Hall*: and you, the "ſaid keeper, are hereby required to receive the ſaid *Abraham* "*Hall* into your cuſtody in the ſaid goal, and him there ſafely "to keep during the time of nine months, or until the ſaid for-"feiture or ſum of fifteen pounds, *together with the charges* "*previous to* and attending the ſaid conviction, ſhall be paid. "And hereof fail not."

Given under my hand and ſeal, *&c. John Drage.* And this is the cauſe of taking and detaining the ſaid *Abraham Hall*, *&c.*

Mr. *Bearcroft* objected to this commitment as illegal. For though the ſtatute is in the alternative "that upon non-payment "of the penalty and coſts, the offender ſhall be committed to "gaol for any time not exceeding twelve months, nor leſs than "ſix, *or* until the penalty and *charges* ſhall be paid, yet this "conviction does not *aſcertain* any ſum for coſts or *charges*: "the time of impriſonment therefore is uncertain, which is "fatal."

Lord

Lord *Mansfield.* This conviction cannot be supported. The principal judgment is a penalty in a certain sum of money, and imprisonment is a coercion of the payment: but while the sum remains uncertain the defendant cannot be released. Therefore, let the conviction be quashed, and the defendant discharged. The three other judges concurred. 1774.

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LOVAT *versus* PARSONS and others, assignees of Allen. *Saturday, May 7th.*

IN *Trover* for a cask of indigo, upon a rule to shew cause why a new trial should not be granted; the facts, as they appeared upon the report of Mr. Justice *Ashhurst*, were as follows:

That one *Allen*, previous to his becoming insolvent, had ordered a small cask of indigo of the plaintiff; who, in consequence of such order, sent him a cask containing about 2 *cwt.* by the waggon. *Allen*, upon receiving notice from the plaintiff of the indigo being upon the road, sent a letter, complaining that the quantity was more than he could take. The answer to which was, that his order had been complied with, and that the plaintiff never sent less, and would expect to be paid for it within four months. *Allen* still objected to the quantity of the indigo, and also to the time of credit; but in a subsequent letter all objections were removed, by the offer of one *Smith* to take all the indigo of the plaintiff at a certain price, to which the plaintiff consented. Subsequent to this, and after the arrival of the indigo in the waggon, *Allen* made an assignment of all his effects for the benefit of his creditors, but refused to assign the indigo, saying it would injure the plaintiff. The question was, "Whether under these circumstances the indigo was the property "of *Allen* or of the plaintiff?" The jury found a verdict for the plaintiff, damages 111 *l.*

Serjeant *Davy*, in support of the rule, insisted, that the indigo having been sent to *Allen*, in pursuance of his order for that purpose, was become his actual property; and therefore, upon his insolvency, ought, as well as his other effects, to be equally divided amongst his creditors. For, though a seller who has delivered goods to a carrier by order of the vendee, may in case of an insolvency stop them *in transitu*, yet if they are delivered to the vendee, as in point of fact this indigo was, the property is effectually altered. If *Allen* had not become insolvent, he

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LOVAT *verſus* PARSONS.

would have been liable to the plaintiff in an action for goods ſold and delivered. If ſo, he is a debtor for them; and this being an aſſignment for the benefit of all his creditors, he would have no right to give a preference to the perſon ſelling the indigo; conſequently the vendor cannot claim ſuch preference.

Lord *Mansfield* inquired, whether the indigo, after arrival, remained in the hands of the carrier till the diſpute between the plaintiff and *Allen* was ſettled? Upon its being anſwered in the affirmative, and that the aſſignees, the day after the aſſignment, had prevailed on the carrier to deliver the goods to them; Lord *Mansfield* ſaid, I think it was a great indulgence in the judge to give you leave to move for a new trial without coſts. This is a diſpute about a parcel of indigo; and *Allen*, the perſon to whom it was originally ſent, refuſes to take it, becauſe the quantity is too great: he next objects to the ſhortneſs of the credit given; and finds fault both with the quality and the price. But at laſt he ſends word to the vendor, that he has met with a perſon who will purchaſe the indigo of the plaintiff in his ſtead, at a certain price; to which price the vendor in anſwer agrees. Subſequent to this, the defendants apply to *Allen* for an aſſignment of his effects for the benefit of all his creditors; and being appriſed of the diſpute relative to the indigo, requeſt him to aſſign that amongſt his other effects. This *Allen* poſitively refuſes to do, ſaying, he would ſooner rob on the highway, for that he had never accepted it. After this declaration, the aſſignees, with full notice that it was not *Allen*'s property, bribe the carrier to deliver the indigo to them, and now inſiſt they are entitled to it, as claiming under *Allen*, though he has renounced all claim or right to it whatſoever. I really never ſaw a caſe ſo void of pretence or law; and am extremely ſorry that leave was given to make the motion without coſts.—The three other judges concurred.—Rule diſcharged.

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*Monday, May* 9th.

## GRIFFIN *verſus* BLANDFORD.

Cuſtom ill ſet forth, for want of ſtating the particular *exceptions* to it.

IN Replevin, the defendant avowed the taking under an ancient cuſtom, that time out of mind, the Lord of the manor, upon the death and alienation of every tenant, was entitled to the ſecond beſt beaſt; if but one, then to that one beaſt; and if no beaſt, then to a compenſation in lieu thereof.

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Upon the evidence, the cuſtom appeared, by a decree of the Duchy of *Lancaſter*, to be, that time out of mind the Lord of the manor, upon the death of every tenant dying ſeized, and upon the alienation of all and every parcel of the ſaid lands, *&c.* had been uſed to have, and of right ought to have, the ſecond beſt beaſt, only one and no more; if but one beaſt, then that one; if no beaſt, then ſo much money as the chief rent amounted to; with an *exception* of meſne ſeignories, burgage tenures; and alienations to the uſe of the alienees and their heirs. Verdict for the plaintiff.

Upon a rule to ſhew cauſe, why a new trial ſhould not be granted, it was objected, that the cuſtom, as ſet forth in the conuſance, was different from the cuſtom proved; no exception being ſtated: and if there had, it might have appeared that this was a caſe within it.

Lord *Mansfield*. I am ſatisfied that, in point of form, the cuſtom is not ſet out as proved; for there is nothing in the plea, which goes to ſhew that burgage tenures and meſne ſeignories are excluded, therefore the objection muſt prevail. But there is nothing upon the merits.

*Per Cur.* Let there be a new trial, with liberty to the defendant to move to amend his plea.

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BLATCH *verſus* ARCHER.

*Same day.*

In debt for an *eſcape* againſt the *ſheriff*, the indorſement of *non eſt inventus* upon the *ca. ſa.* is ſufficient evidence of its being delivered to the ſheriff.

UPON ſhewing cauſe, why a new trial ſhould not be granted, in this caſe, Mr. Juſtice *Willes* read his report as follows: ——"This was an action of debt againſt the ſheriff of "*Eſſex*, for an eſcape of one *Moody*. The declaration ſtated a "judgment of this court in debt, an arreſt, and a ſubſequent "eſcape. At the trial, a queſtion aroſe, whether the arreſt was "legal? It was objected, Firſt, that there was no proof of a "*ca. ſa.* being *delivered* to the ſheriff. But I held, the return "of *non eſt inventus* indorſed upon the writ ſufficient in this "action. Secondly, That the arreſt, if any, was by the ſon of "the bailiff, and not by the bailiff himſelf, who was at the "diſtance of thirty rods, and not *in ſight*, therefore *no legal* arreſt. But I left it to the jury to ſay, whether old *Fenton*, "the officer, was not *quodam modo* preſent at the time of the arreſt; the jury found that he was, and gave a verdict for the "plaintiff."—Upon the motion and now, a third ground of objection was made, namely, that no *warrant* was produced: but

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but Mr. Juſtice *Willes* ſaid, he did not recollect that objection being mentioned at the trial.

Serjeant *Kempe* and Mr. *Lucas* ſhewed cauſe. Firſt, The queſtion, whether old *Fenton* the officer was or was not preſent at the time of the arreſt, was a fact proper to be left to the jury. For it is nowhere laid down that the actual taking muſt be by the bailiff himſelf; it is ſufficient if it be by the aſſiſtant, and the bailiff be near at hand. In 6 *Mod.* 211. which is the only caſe upon the ſubject, there was no determination. Secondly, It is not neceſſary in an action againſt the ſheriff to prove that the *ca. ſa.* was delivered to him.

Mr. *Morgan* ſaid, his objection was that the *warrant* was not produced.

*Anſwer.* The warrant is in the hands of the officer, and therefore it is not in the power of the plaintiff to produce it: nor is it neceſſary in this action where the ſheriff is charged *civilly*. Otherwiſe, in an action of falſe impriſonment; for there a clear and regular authority muſt be ſhewn in every particular, or he is not chargeable; but here his own irregularity ought not to be an excuſe for his neglect. Beſides, the ſheriff's agent, one *Thomlinſon*, who was called and could have proved it, immediately, upon hearing his name, ran out of court to avoid his being examined.

Mr. *Wallace*, Mr. *Cox*, and Mr. *Morgan* in ſupport of the rule.

The fact to be proved in this caſe is, that the party was legally arreſted: To eſtabliſh which it muſt be ſhewn, either that the arreſt was by the ſheriff himſelf, or by virtue of a warrant in the hands of an officer, duly ſigned and ſealed by the ſheriff: for, an arreſt under a *verbal* authority would be illegal; and the party arreſted would be entitled to his diſcharge. It would be ſtrange in ſuch caſe to charge the ſheriff as for an eſcape under a *legal* arreſt. It was neceſſary therefore to ſhew that *Fenton* the officer had an authority; with regard to which there is no evidence; for the writ and the return only ſhew that the ſheriff had a writ: and it was in their power to have proved it; for they might have ſubpœnaed *Fenton*, and given him notice to produce the warrant. But ſecondly, ſuppoſe the warrant had been proved, this is no legal arreſt. For the warrant was given to the officer; and the arreſt was by his ſon, at the diſtance of thirty rods, which are two hundred yards, not even in ſight of the father, much leſs in his preſence which is neceſſary.

Mr.

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Mr. *Morgan* objected ſtrongly that the warrant * was demanded by *Moody* the perſon arreſted, and not ſhewn; therefore the arreſt was bad; and cited 6 *Co.* 54. The counteſs of *Rutland*'s caſe.

Lord *Mansfield*. This is rather a hard action; and certainly, in a caſe attended with hardſhip, juries have a leaning as far as juſtice will permit them, and ſo has the court. But ſtill I am not ſatisfied to ſay, that the verdict in this caſe is wrong.

An arreſt muſt be by the *authority* of the *bailiff*; but he need not be the hand that arreſts, nor in the preſence, nor actually in ſight, nor within any preciſe diſtance, of the perſon arreſted.

Several objections have been made; 1ſt. That the arreſt was not by the ſheriff's officer himſelf, for that the father was the officer, and the ſon the hand that arreſted. That the officer muſt be the *authority* to arreſt, is certain: but he need not be the hand that arreſts, nor in the preſence of the perſon arreſted, nor actually in ſight, nor is any exact diſtance preſcribed. As to the bailiff being the authority in this caſe, it is in proof that *old Fenton* came to *Ingateſtone* to arreſt *Moody*, and went out of the public houſe for *that purpoſe*. It is true one of the witneſſes ſpeaks to his being at the diſtance of thirty rods; but he does not ſpeak at the time of the arreſt; nor is it eaſy to ſpeak with certainty, as to diſtance at a particular time. But it is ſaid, that *young Fenton* the ſon, who could have cleared up the doubt, ought to have been ſubpœnaed by the plaintiff. It is certainly a maxim that all evidence is to be weighed according to the proof which it was in the power of one ſide to have produced, and in the power of the other to have contradicted. But I think it would have been very improper to have called the ſon; for in fact it is an action againſt his father the bailiff, though nominally againſt the ſheriff. Upon the whole therefore I am of opinion, that the fact was fairly and properly left to the jury; it was their province to judge, whether the officer was on *that buſineſs*; and if he was immediately following the ſon, it is ſufficient. It would have been a different caſe if he had been upon ſome other errand, or had ſtaid at home, and ſent a third perſon to make the arreſt.

As to the other objections, it is clear, that *old Fenton* was the officer who was to arreſt: and being ſo, his name, according to the uſual practice, is indorſed on the writ. *Laſtly*, the return of *non eſt inventus* on the back of the writ is ſufficient evidence againſt the ſheriff of the delivery of the *ca. ſa.* for it is an acknowledgment of it under his own hand. Therefore I am of opinion there is not ſufficient ground for granting a new trial.

* The evidence was, that young *Fenton* ſaid at the time of the arreſt, that he had his authority in his pocket, and that it was at the ſuit of Mr. *Blatch*. The name of old *Fenton* was indorſed upon the writ.

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*Aſton* Juſtice. It is not neceſſary that the bailiff ſhould be actually in ſight, but he muſt be ſo near, as to be near at hand, and acting in the arreſt; and the jury in this caſe have found that he was.

With reſpect to the delivery of the *ca. ſa.* it is evident it muſt have been delivered from the return of *non eſt inventus* indorſed upon the back of it. But it is further objected, that there ſhould have been a *mandate* to the officer, who was to take the body. Here *Fenton* was the perſon appointed; and his name appears upon the back of the writ, which it ſeems is the uſual ceremony of authorizing the bailiff to arreſt. But a material fact in this part of the caſe is, that the ſheriff's agent, one *Thomlinſon*, whoſe buſineſs it was to make out the warrants, and who could have proved the fact, upon being called, ran out of court to avoid being examined. Therefore I am of opinion, upon all the objections, that the rule ought to be diſcharged.

*Aſhhurſt* Juſtice. I am of the ſame opinion. The jury have found that the officer was ſo near as to be acting in the arreſt; which is ſufficient: he need not be actually in ſight. 2dly. It may be very difficult for a plaintiff to be able to prove the exiſtence of a *warrant*, which is in the cuſtody of the officer, and neceſſary to be ſo, as his own juſtification. Therefore very ſlight evidence is ſufficient to ſhew that there was a warrant, and here the bailiff's name is indorſed on the writ; which is the uſual method.

*Per cur:* Let the rule be diſcharged.

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*Tueſday, May* 10th.

## WHITBREAD *verſus* BROOKSBANK.

The price of barley at the *port* is the rule of the bounty upon the exportation of ſtrong beer, and not the *average* price of barley throughout the *kingdom*.

THIS was an action on the caſe, for money had and received by the defendant, an officer of the exciſe, to the uſe of the plaintiff. The jury found a ſpecial verdict in ſubſtance as follows:

"That the plaintiff, after the 24th of *January* 1761, brewed from malted corn, and duly exported from the port of *London*, 6229 barrels of *beer* as merchandize at different times from the 6th of *June* 1771, to the 15th of *September* 1772, when barley was *at* and under the price of 24*s.* per quarter *at* the ſaid *port of London*, and *above* the ſaid price of 24*s.* per quarter, according to the *average price* of corn throughout the kingdom at large, as

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publiſhed in the Gazette, according to ſtat 10 *Geo.* 3. *c.* 39. for *regiſtring the prices of corn* in the ſeveral counties of *Great Britain*; upon which 6229 barrels of beer, the duties were charged and paid: and the ſaid plaintiff claimed to be allowed, by the commiſſioners of exciſe, and the ſaid *Stamp Brookſbank*, their proper officer in this behalf, the bounty of one ſhilling a barrel, amounting to 311*l.* 9*s.* 9*d.* by virtue of the ſtat. 1 *Geo.* 3. *c.* 7. *ſ.* 6. which directs ſuch bounty to be allowed on beer exported, when barley is at or under the price of 24*s.* per quarter, and which bounty, the ſaid commiſſioners and the ſaid *Stamp Brookſbank* had refuſed to allow: and that it was the *uſage* of the commiſſioners of exciſe to allow ſuch bounty on beer exported from the port of *London*, when the price of barley was 24*s.* per quarter, or under, at the port of *London*." The queſtion upon this ſpecial verdict was; "Whether the bounty was to be regulated according to the *average price* of barley throughout the kingdom, or according to the price at the port of *London*, from whence the beer was exported?"

Mr. *Davenport* for the plaintiff. The firſt act of parliament relative to the ſubject-matter in diſpute is 1 *W.* and *M.* *c.* 12. which gave a bounty on the exportation of corn. The act on which the preſent queſtion immediately ariſes, is 1 *Geo.* 3. *c.* 7. *ſect.* 6. which, reciting the ſtat. 1 *W.* and *M.* *c.* 12. and the bounty there given on corn, grants a bounty on the exportation of beer made from malted corn, as a further encouragement to agriculture. The ſtat. 13 *Geo.* 3. *c.* 43. which is the laſt act upon the ſubject, repeals all the former bounties, and grants others in lieu thereof, *to be paid and allowed* by the ſame rules and regulations as the former bounties were paid and allowed, &c. By compariſon of all theſe acts, it appears, that the rule of the bounty muſt be taken from the price of barley at the port or place of exportation. For though the ſtat. 1 *Geo.* 3. *c.* 7. is ſilent on that head, yet it certainly had a reference to the ſtat. 1 *W.* and *M.* *c.* 12. and it is found by the ſpecial verdict, that the uſage always has been to allow the bounty according to the price at the port of *London*. The queſtion then is, whether the *regiſter* act ſtat. 10 *Geo.* 3. *c.* 39. has made any alteration, or varied the rule in any reſpect? and it clearly has not, for it fixes no bounty, it regulates no price, it has no reference at all to the ſubject-matter. Further it appears from a compariſon of the two acts, that the regiſter act had

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quite a different object in view, namely, to enable the legiſlature to fix ſome permanent rule and price for the general exportation and importation of corn, &c. and this is the more apparent from the ſtatute made the next ſeſſions 11 *G.* 3. *c.* 1. to prohibit the exportation. Then followed the ſtat. 13 *Geo.* 3. *c.* 43. which, after reciting and taking into conſideration all the old rules, enacts, that whenever the different ſorts of grain, &c. there ſpecified ſhall bear ſuch a price *at* the *port* or place, &c. all duties upon importation are to ceaſe, and a leſs duty ſhall be paid; and when they bear ſuch a price the particular bounties upon exportation there mentioned are to commence; *which bounties are to be* paid and *allowed by the ſame rules and regulations as the former bounties on corn or grain, and in as* full and *ample a manner as if the clauſes* in ſuch former acts *were repeated.* From theſe ſeveral acts it appears, that as the prices of grain have varied in different parts of the kingdom, the rule which the legiſlature has purſued, in reſpect of the price, has been in ſome meaſure regulated by the relative ſcarcity of the commodity itſelf at each particular port. But as there has been no difference in the rule reſpecting the bounty from the 1ſt *W.* and *M. c.* 12. to the 1ſt *Geo.* 3. *c.* 7. and the ſtat. 13 *Geo.* 3. *c.* 43. certainly making none, the plaintiff in this caſe is clearly entitled to it.

Mr. Serjeant *Walker* for the defendant. The bounty muſt be taken from the national average price throughout the kingdom. Before the ſtat. 10 *Geo.* 3. *c.* 39. no doubt the rule of the bounty was according to the price of each reſpective place of exportation; but the legiſlature ſaw the inconvenience of regulating the bounty by the price at a particular port, when the general price throughout the kingdom might be different. And therefore provided by this act, that an average price ſhould be aſcertained: And wiſely; otherwiſe the moſt alarming conſequences might enſue. The nation at large might be in want of corn, when, at a particular port, the price either by deſign or accident had been raiſed; and the general ſcarcity would be increaſed at the additional expence of a bounty to the very perſon increaſing it, namely, the exporter. The medium price of all the markets in *England* ought to be the price, and is the right one.

Lord *Mansfield.* My principal doubt is, how this came to be made a queſtion; becauſe I do not ſee the ground upon which the exciſe have varied the former uſage. The act of *W.* and *M.* refers to the price at the port, and the uſage under it has been uniformly ſo. Then follows the ſtat. 1 *Geo.* 3. *c.* 7. which gives a bounty

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bounty upon the exportation of beer, to be governed by the price of barley; and the jury find, that the rule, by which the exciſe has governed itſelf in the allowance of this bounty, has been, by the price of barley at the *port* This rule has continued to the 10 *Geo.* 3. *c.* 39. which was made for quite a different purpoſe, whether politically or not is a great doubt: but the view was to guide the judgment of the legiſlature in aſcertaining the quantity of corn and grain, exported and imported, in order to fix a rule by which the price of corn might be known in all parts, and conſequently to render it capable of having an average price fixed: but it does not refer or apply to any of the former acts, or make mention of them. *Laſtly*, the ſtat. 13 *Geo.* 3. *c.* 43. was enacted, which regulates the bounty according to the price at the port, but does not ſay a word about an average price. What then is the ground on which a new conſtruction is to be made? I profeſs I cannot ſee: it was very eaſy for parliament to have ſaid, if they had thought fit, or had judged it wiſe ſo to do, that the bounty ſhould be regulated according to the average price of corn, &c. I really can ſee no ground upon which the commiſſioners of exciſe proceed.

An action for *money laid and received* does not lie againſt a *revenue officer* to recover an *over-payment*.

The court upon the argument had obſerved, that the verdict could not ſtand, becauſe an action for money had and received will not lie againſt an exciſe officer for an over-payment, and that the word "*ſtrong*" beer ought to have been inſerted: for the ſtat. 1 *Geo.* 3. relates to "*ſtrong*" beer only. But theſe objections were very candidly waived by Mr. Serjeant *Walker*. Lord *Mansfield* now ordered it to be ſtated, that the defendant by conſent waived the irregularity in the finding, and the omiſſion of the word "*ſtrong*" beer; for his Lordſhip added, it might be of great inconvenience, if this caſe ſhould hereafter be made a precedent, that an action for money had and received, will lie againſt an officer of revenue for an overpayment.

The reſt of the judges concurred.

*Poſtea* delivered to the plaintiff.

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*Same day.*

## BUTLER *verſus* COOKE.

An uncertificated bankrupt may be a witneſs to decreaſe but not to increaſe the fund.

THIS was an action on the caſe for goods ſold and delivered. *Non aſſumpſit*, and verdict for the plaintiff.

Upon ſhewing cauſe why a new trial ſhould not be granted, the queſtion was, Whether one *Baker* who had been twice a bankrupt, but had not obtained his certificate, could be admitted as an evidence to prove that the goods in queſtion were delivered to the defendant on the credit and for the uſe of him the bankrupt, and not on the defendant's own account. At the trial he was rejected as being an intereſted witneſs.

Mr. *Cox* and Mr. *Inys* againſt the new trial objected, that *Cooke* being a creditor to a very conſiderable amount, the bankrupt was intereſted in leſſening his debt as an inducement to *Cooke* to ſign his certificate, and therefore his evidence was clearly inadmiſſible.

Mr. *Lucas* in ſupport of the rule. This is a ſecond commiſſion, under which the inclination of the creditors to ſign or not to ſign the certificate is of no avail: for by ſtat. 5 *Geo.* 3. *c.* 30. no man can obtain his certificate under a ſecond commiſſion, unleſs he pays 15 *s.* in the pound.

Mr. *Buller*, on the ſame ſide, cited the caſe of *Langden* and others aſſignees of *Walker* verſus *Walker*, *Mich.* 13 *Geo.* 3. *B. R.* as in point. "That was an action for money due to the bankrupt "from the defendant, and was tried at the ſittings after *Trinity* "term 13 *Geo.* 3. before Lord *Mansfield*; upon the bankrupt "being called as a witneſs on the part of the defendant, an "objection was taken to his competency, becauſe he had not "obtained his certificate. But Lord *Mansfield* over-ruled the "objection. Afterwards, on a rule to ſhew cauſe why a new "trial ſhould not be granted, upon the ground of his being an "incompetent witneſs, *per* Lord *Mansfield* and the court, it is "a ſettled rule, that a bankrupt may be a witneſs to *diminiſh* the "fund, though he has not obtained his certificate; becauſe, in "ſo doing, he ſpeaks moſt manifeſtly againſt himſelf: for he "may not only defeat his title to the benefit which the law "allows him if the fund is of a certain amount, but he ha-

zards

" zards the diſpleaſure of all his other creditors. But he is not " a good witneſs, for the purpoſe of enlarging the fund, unleſs " he gives a releaſe and has got his certificate."

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Lord *Mansfield*. This is a very clear caſe. The circumſtance of this being a ſecond inſolvency, makes no difference with reſpect to the principle. A bankrupt who has not obtained his certificate, may be a witneſs againſt himſelf, but not for himſelf; that is, he may be a witneſs to decreaſe the fund, but not to increaſe it: And in this caſe, his evidence clearly goes to decreaſe it. Therefore he is a competent witneſs. The conſequence is, that the rule for a new trial muſt be made abſolute.

The three other judges concurred.

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ORTON *et al.*, aſſignees, *verſus* VINCENT *et al.*, bail of BEDFORD.

*Wedneſday, May 11th.*

MR. *Buller* had moved to ſtay the proceedings in this caſe upon the aſſignment of the bail-bond, upon payment of coſts and the ſum ſworn to; the defendant in the original action being dead. Mr. *Mansfield*, who ſhewed cauſe, ſaid, this was not the practice where the bail-bond is aſſigned, though it might be allowable upon putting in bail above: but after aſſignment, the bail can only redeem themſelves by payment of the debt and coſts. It was ſo ſettled in *Savage* v. *Weſt*, 9 *Geo.* 3. Mr. *Wallace* there ſhewed cauſe, why, upon payment of eleven guineas (the ſum ſworn to) and coſts, all proceedings on the bail-bond ſhould not be ſtaid; and why an *exoneretur* ſhould not be entered on the bail-piece. The court diſcharged the rule, and held, that the plaintiff in the action was entitled to recover not only the ſum ſworn to, with coſts, but the whole debt due.

Where the plaintiff might have had judgment againſt the original defendant, the bail below are liable for the whole debt and coſts.

Mr. *Buller* in ſupport of the rule. The diſtinction is, where the plaintiff could not have had judgment in the original action: there, it is clear, that the proceedings may be ſtaid upon payment of *coſts only*. 1 *Barnes* 48. 63. 2 *Barnes* 79. Thoſe caſes are in conformity to the general rule of the court, never to make a bail-bond ſtand as a ſecurity, where the plaintiff can be put in as good a condition as if he had never been delayed. Here, the declaration was delivered on the 8th of *February* laſt, and the defendant died in the vacation. Therefore, as the plaintiff could not have had a verdict, nor, of courſe, judgment under the ſtat. 17 *Car.* 2. *c.* 8. he could have reaped no benefit from the ſuit. He

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OSTON *verſus* VINCENT.

hoped therefore the court would, under theſe circumſtances, ſtay the proceedings upon payment of coſts only; without the addition of the ſum ſworn to, as prayed by the rule.

But it appeared, by Mr. *Mansfield*'s affidavit, that the plaintiff might have proceeded to trial in the original action, at the ſittings after laſt *Hilary* term; and as the defendant did not die till after that time, the plaintiff might of courſe have entered up judgment in the beginning of this term, under the ſtat. 17 *Car.* 2. *c.* 8.

*Per Curiam.* The practice is ſettled, that where the plaintiff might have had judgment againſt the original defendant, the bail below are liable for the whole debt and coſts: and in this caſe it is clear he might have had judgment againſt the original defendant. Therefore let the rule be diſcharged.

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*Same day.*

## GRIBBLE *verſus* ABBOT.

MR. *Cowper* had moved to ſtay the proceedings in an action upon the judgment, pending a writ of error. Mr. *Buller* on ſhewing cauſe, produced an affidavit, in which it was ſworn, that the defendant himſelf had acknowledged that the writ of error, which had been depending two years, was merely for delay.

The court ordered, that upon the defendant's confeſſing judgment in this action, and undertaking to bring no writ of error thereupon, execution ſhould be ſtaid till the determination of the writ of error depending. Mr. Juſtice *Aſton* ſaid, the court had made a like rule a few terms ago.—It was then objected, that the defendant might ſtill bring his bill in equity. But the court ſaid, they could not make him undertake to waive his right in that reſpect.

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*Friday, May* 13th.

A defendant who has been ſuperſeded, for want of being charged in execution within two terms after judgment, cannot be held to *ſpecial bail* in an action brought upon ſuch *former* judgment: but he may be charged in *execution*, after *judgment* obtained in the *ſecond* action.

## BLANDFORD *et al.* executors, *verſus* FOOT.

THIS was a rule to ſhew cauſe why the writ of *capias ad ſatisfaciendum*, iſſued in this cauſe, ſhould not be ſet aſide for irregularity, and why the defendant ſhould not be diſcharged out of the cuſtody of the ſheriff of *Middleſex* as to this action.—The defendant had been ſuperſeded for want of being charged in execution within two terms after judgment. Eight years after, the executors of the original plaintiff brought an

action

action of debt on the former judgment; and having obtained judgment in this ſecond action, cauſed the defendant to be taken on the *ca. ſa.* mentioned in the rule; whereupon Mr. *Baldwin* moved as above. 1774. BLANDFORD *verſus* FOOT.

And now, on the part of the defendant, he inſiſted upon it as an univerſal rule, that where a defendant has been once diſcharged out of cuſtody, at the ſuit of a plaintiff, he can never be taken in cuſtody again at the ſuit of the ſame plaintiff.

Mr. *Buller contrà.* The rule does not extend ſo far as Mr. *Baldwin* has laid it down; it goes no further than that the defendant ſhall not be held to *bail* in the ſecond action. But he may be taken in *execution* after judgment obtained in ſuch ſecond action: becauſe the debt is not the ſame as that for which the original action was brought, but is increaſed by the coſts, and in the preſent caſe by intereſt. He cited *Poulter* v. *Salmon*, *Hil.* 13 *Geo.* 2. *Barnes* 383. where the defendant having been ſuperſeded after judgment for want of being charged in execution, and being taken in execution upon a judgment obtained in an action on the firſt judgment, applied to be diſcharged. The *C. B.* took time to conſider of it. The next term the defendant obtained a rule to be carried to the next aſſizes, to be diſcharged on the Lords' act: But this laſt rule was diſcharged by the court, and nothing further was done on the preceding rule. Therefore he inſiſted, it was a ſufficient authority to ſhew that a defendant may be taken in execution in a ſecond action.

Mr. Juſtice *Aſton.* (Lord *Mansfield* abſent.) A defendant cannot be taken in cuſtody again upon the *ſame* judgment after being ſuperſeded; nor can he be held to bail in a ſecond action; but in a new action, I incline to think he may be charged in execution. In *Bonnevell* verſus *Owlett*, *Mich.* 19 *Geo.* 2. *R. B. Wright* Juſtice thought he could not, but *Deniſon* Juſtice doubted whether the court could prevent it; becauſe the ſecond judgment was for coſts alſo. That caſe was adjourned.

*Curia adviſare vult.*

The next day, Mr. Juſtice *Aſton*, (Lord *Mansfield* abſent,) delivered the opinion of himſelf and the other two puiſne judges.

We have looked into the authorities, and are of opinion that in this caſe the rule muſt be diſcharged. In the caſe of *Wright* adminiſtrator verſus *Kerſwill*, *Barnes* 376. *Mich.* 10 *Geo.* 2.

*C. B.*

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BLANDFORD *verſus* FOOT.

C. B. a diſtinction was taken between a *ſuperſedeas* upon *meſne* proceſs, and a *ſuperſedeas* after *judgment* obtained: in which caſe it was decided, "that as the defendant had there been diſcharged by *ſuperſedeas* before judgment, he was not finally "diſcharged, and therefore liable after judgment to be taken in "execution; though where a defendant is ſuperſeded after judg-"ment, for want of being taken in execution within two terms "after judgment obtained, his perſon cannot afterwards be taken "in execution." Here that caſe ſtopped: but the proceedings were all in the *ſame* action, not in a *new* one, upon a former judgment. Then in the caſe of *Poulter* verſus *Salmon: Hil.* 13 *Geo.* 2. *C. B. Barnes* 383. which was preciſely the ſame as this caſe, there was no deciſion; becauſe a ſubſequent application was made by the defendant, pending the conſideration of the court upon the *ſuperſedeas*, to bring him up to the next aſſizes to be diſcharged upon the Lords' act; and he had a rule accordingly; but this laſt rule was afterwards diſcharged, as being inconſiſtent with the application for a *ſuperſedeas*. Upon looking into the rule of *C. B. Hil.* 8 *Geo.* 2. we think its ſole object was to prevent the defendant from being held to *bail* in a new action: for it provides only, that if after a *ſuperſedeas* an action of debt be brought upon the judgment, a *common appearance* ſhall be accepted for the defendant in ſuch action: but it is totally ſilent as to execution, or the proceedings thereupon. In the caſe of *Bonnevell* verſus *Owlett*, *Mich.* 19 *Geo.* 2. *B. R* which I thought had received no deciſion, I find, by the aſſiſtance of Sir *James Burrow*, who was ſo diligent as to remain in court till 9 o'clock at night on the laſt day of the term, that it was decided, and the rule diſcharged. His note is as follows: *November* 7th, *Mich.* 19 *Geo.* 2. The defendant, who in a former action againſt him had not been charged in execution in due time, had a new action brought againſt him on the former judgment for debt and coſts. Upon a rule to ſhew cauſe why he ſhould not be diſcharged, the queſtion was, Whether his perſon could be now taken in execution upon this ſecond action?—*Lee* Chief Juſtice, *Deniſon* and *Foſter* thought the court could not deprive the plaintiff of the benefit which the law entitled him to. But *Wright* thought this would be an effectual method for the plaintiff to evade the benefit intended for defendants (who were inſolvent) by the Lords' act. *Adjornatur.* Before I proceed to the ſubſequent determination of this caſe, I muſt obſerve, that as to evading the Lords' act, in 2 *Str.* 943.

*Maud*

*Maud* verſus *Branthwaite*, the court would not allow of ſuch evaſion. In that caſe, the defendant being in cuſtody, the plaintiff obtained judgment; and inſtead of charging the defendant in cuſtody (whereby he would be entitled to his diſcharge on the Lords' act) the plaintiff brought an action of debt upon the judgment, and charged him in cuſtody. But on application to the court, when he had lain two terms after the judgment, the court diſcharged him on common bail: ſaying, "it was a "trick to deprive the defendant of the benefit of a merciful "law." So that the party ſhall not deprive a defendant from receiving this benefit by a trick.—To return to the caſe of *Bonnevell* verſus *Owlett*, thus much having paſſed as before ſtated on the 7th of *November*; afterwards, on the laſt day of the term, Sir *John Strange* of counſel for the defendant owned, that the defendant had never been charged in *execution* upon the *firſt* judgment, though he had lain long enough to have been charged if the plaintiff had thought fit to have done ſo. Whereupon the court were clearly of opinion that he might now be taken in execution, *having never been charged in execution before*; and accordingly diſcharged the rule.

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BLANDFORD *verſus* FOOT.

This caſe is preciſely in point; and to be ſure the reaſon of the thing is exceedingly ſtrong; namely, that the defendant *never* has been charged in *execution*. The benefit of common bail may be reaſonable before judgment; but that is no reaſon why after judgment he ſhould not be charged in execution. Therefore upon the authority of *Bonnevell* verſus *Owlett*, and the reaſon of the thing, my brethren and I are of opinion, that the rule ſhould be diſcharged.

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## REX *verſus* BINSTED and others, burgeſſes of Portſmouth.

*Saturday, May 14th.*

UPON ſhewing cauſe why an information in the nature of a *Quo warranto*, ſhould not be granted againſt the defendants, to ſhew, by what authority they claimed to be burgeſſes of the borough of *Portſmouth*; the Objections were: *Firſt*, That there was not a ſufficient majority to elect. *Secondly*, No ſummons. *Thirdly*, The day on which they were elected was a day appointed by the charter itſelf for other buſineſs, and not for election.

The diſcretion of the court, in granting an information in the nature of a *Quo warranto* within twenty years, is to be guided by circumſtances.

Exception

1774.

REX versus BAMFYLD.

Exception was taken by Mr. *Buller*, who ſhewed cauſe, that the Town clerk, upon whoſe affidavit alone the information had been prayed, was as fully appriſed of all the objections ſtated in the affidavit, at the election of the defendants ſeven years before as at the time of the preſent application: and therefore, being the only proſecutor, the information ought not to be granted at his inſtance: and cited the caſe of *Rex* v. *Radnor*, 1 *Bur.* 781.

To this it was anſwered by Mr. *Bearcroft* and Serjeant *Glynn* in ſupport of the rule, that there is no general rule for the court to refuſe an information, becauſe the proſecutor was preſent at the proceeding complained of, and did not immediately apply. That in this caſe the Town clerk was not the proſecutor, but a witneſs only, from his office capable of giving the beſt evidence relative to the right mode of election: but at the ſame time merely miniſterial; without power to adviſe or remonſtrate againſt any illegality in the proceedings of the corporation. He only informs the court of the fact, and ſwears to the cuſtom.

Lord *Mansfield*. The court has very rightly eſtabliſhed it as a general rule, that after twenty years undiſturbed and peaceable poſſeſſion, they will not grant an information under the diſcretionary power given them, by the ſtat. 9 *Ann. c.* 20. This rule does not interfere with the right of the crown to proſecute by the Attorney General, who may file his information *ex officio*: but it was adopted by the court upon principles of public convenience, and by analogy to many other caſes. The limitation has by ſome gentlemen been thought *too long*: and ſeveral applications have been made to parliament to narrow it; but the legiſlature hitherto has not thought proper to interfere. The occaſion which gave riſe to it was the proſecution againſt the borough of *Winchelſea*, * *Mich.* 7 *Geo.* 3. in which the court was ſo ſtruck with the attempt to impeach a poſſeſſion of thirty years, that they thought it neceſſary to fix ſome certain point of limitation, beyond which they would not go back to diſturb a franchiſe ſo long acquieſced in; and accordingly the rule above was eſtabliſhed. But the court declared at the ſame time, that though *twenty* years poſſeſſion ſhould be a bar without any other circumſtances, yet they did not mean to be underſtood, that under *circumſtances* they would not refuſe an information even *within* that period: and accordingly in one * of the *Winchelſea* cauſes, a ſolemn judgment was given againſt the application under the particular circumſtances of that caſe. But *no* rule has been laid down as *deciſive* reſpecting an information *within* that time

2 *Bur.* 1962.

4 *Bur.* 2017. 2121.

time: but it depends upon a variety of circumſtances. If the party applying has been guilty of any iniquitous practice, the court will not admit his complaint as a ſufficient ground for granting an information. And in *Rex* v. *Lewis*, 1 *Bur.* 780. there was improper behaviour in the perſon applying. So, if the defence depends upon a matter of fact, which may be loſt or made difficult of proof by length of time, though within twenty years; and the party applying lies by, till this evidence of defence may be loſt, as in the caſe of reſidence. Another ſet of circumſtances weigh very much; namely, where many derivative rights, and many corporate acts may be overhaled ſo as to endanger the diſſolution of the corporation.

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REX *verſus* BIRSTED.

Let us then conſider the circumſtances of the preſent caſe. It appears here that ſome champion on the other ſide has firſt thrown the gauntlet, and diſturbed the peace of the corporation; and that all would have been quiet if the other ſide had not been the aggreſſors. This is a ſort of defence rather than an attack. There is no lying in wait by the perſon on whoſe affidavit the information is prayed; no difficulty of proof with reſpect to any matter of fact. On the contrary one of the matters in queſtion is a general cuſtom which can be eaſily proved the one way or the other. The poſſeſſion is but a poſſeſſion of ſeven years, from which no great diſtreſs is likely to ariſe, and with reſpect to the conduct of the perſon upon whoſe affidavit the application is founded, the office of town-clerk, which he holds, does not oblige him to be acquainted with the regularity of the proceedings, or to impeach for want of it. But the material circumſtance is, that he is not the proſecutor, but a witneſs only; and it is not ſo much an attack as a defence.

The other judges concurred.

Rules made abſolute, fourteen in all.

THE END OF EASTER TERM.

# TRINITY TERM

## 14 GEORGE III. B. R. 1774.

*Monday, June 6th.*

### REX *verſus* Inhabitants of BODENHAM.

*A Certiorari pro rege lies on ſtat. 13. Geo. 3. c. 78. ſect. 24. relative to highways before traverſe of the indictment or judgment thereupon.*

THIS was an indictment upon the ſtat. 13 *Geo.* 3. *c.* 78. for a nuiſance in the highway. The proſecutor had taken out a *Certiorari* which the defendants had moved to ſuperſede, and now upon ſhewing cauſe why a *procedendo* ſhould not iſſue, Mr. *Wallace* inſiſted, that ſect. 24 of the ſtat. which provides, "that "no indictment or preſentment ſhall be removed by *Certiorari* "till ſuch indictment be traverſed, and judgment thereupon "given," does not extend to the crown, but only to a *Certiorari* at the inſtance of a defendant. That the above clauſe is copied from the very ſame clauſe in the ſtat. 22 *Car.* 2. *c.* 12. *ſect.* 4. and cited the caſe of *Rex* verſus *Farewell*, 2 *Str.* 1209. where the court held, that the clauſe, in the laſt mentioned ſtatute, related only to a *Certiorari* moved for at the inſtance of defendants and not to a *Certiorari pro Rege*.

Mr. *Bearcroft contrà* for the defendants admitted, that the King has a right to try his own cauſe in whatever court he pleaſes: but here a private perſon is the real proſecutor, and therefore not entitled to the ſame privilege.

But *per cur:* In caſes of this ſort there is no diſtinction; and the words "till ſuch indictment be traverſed, *&c.*" ſhew very plainly that this clauſe was not intended to take away a *Certiorari* at the inſtance of the crown: for the King does not traverſe. It was calculated only to prevent defendants bringing a *Certiorari* for delay. Therefore let the rule be made abſolute.

1774.

Same day.

## REX *verſus* GARDNER.

THIS was a rule to ſhew cauſe, why an order of ſeſſions made for amending a rate or aſſeſſment made for the relief of the poor of the pariſh of *St. Botolph* in the town of *Cambridge* ſhould not be quaſhed for the inſufficiency thereof.

A corporation ſeiſed of lands in fee for their own profit, are within the meaning of ſtat. 43 *Eliz.* c. 2. inhabitants or occupiers of ſuch lands, and, in reſpect thereof, liable in their *corporate capacity* to be rated to the poor.

The ſubſtance of the caſe ſtated was as follows: That *Philip Gardner*, burſar of *Catharine Hall*, *Cambridge*, appealed from a poor rate, whereby he was charged the ſum of 2 *l.* 15 *s.* for 55 *l. per annum*. That about the years 1754 and 1755, the maſter and fellows of the ſaid college purchaſed five houſes in the pariſh of *St. Botolph* of the annual rent of 55 *l.*; and being ſo ſeiſed thereof, pulled them down and converted the ground upon which they formerly ſtood, in the firſt place, towards erecting twelve apartments for the reception of ſix fellows and ſix ſcholars, upon the foundation of Mr. *Ramſden*: that this building adjoined the old college; but had never been inhabited: that another part was taken into the maſter's garden: that about 140 feet in length of the college walls, together with the gates, ſtood upon another part which was taken into the college court, and incloſed by the walls: a part, between the college walls on the outſide and the ſtreet, was appropriated towards making an area, and planted with trees for ornament: And on the reſidue were erected two houſes adjoining to each other, one inhabited by the college butler and his family, the other by the college porter, both without the college; the former having no communication with it, but through the latter there was an entrance for the ſociety to come into the college after the gates were ſhut. That both the butler and the porter had the entire uſe of their reſpective houſes without the college intermeddling therewith, and took in lodgers and boarders. That after the houſes were pulled down, the rates and taxes of the pariſh ceaſed, and from 1761 to 1769 no rates or taxes were paid by the maſter and fellows; that the pariſh then aſſeſſed the college to the land-tax at the rate of 55 *l.* a-year rent for the premiſes. That the maſter, *&c.* paid the ſame from that time: that at the ſame time the pariſh rated them for the premiſes to the poor rate for 55 *l.* in the ſame manner as in the rate is ſet forth. That the ſaid *Gardner* now

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now is, and at the time of making the rates was, burſar of the ſaid college. This court therefore is of opinion, that the ſaid rate or aſſeſſment as to all perſons named therein (except the ſaid *Philip Gardner* for the maſter and fellows) ſhould be confirmed, and as to the aſſeſſment on *Gardner* that the ſame ſhould be *amended* by ſtriking out the ſaid charge on him, and rating the *maſter* and *fellows* for the ſaid premiſes, except ſuch part as is taken in for the new buildings for ſix fellows, and ſix ſcholars in the proportion following.

| | £. | s. |
|---|---|---|
| The reverend Dr. *Preſcot* maſter of the ſaid college for part of his garden, - - | 1 | 0 |
| The maſter and fellows for the houſe erected for the butler, - - - - | 4 | 0 |
| Ditto for ditto for the porter, - - - | 3 | 0 |
| Ditto for ditto for the reſt of the premiſes added to the college court, and for part of an area to the college, - - - | 43 | 15 |

Mr. *Manſfield* ſhewed cauſe. The queſtion is, Whether the maſter and fellows of *Catharine Hall* are liable to be rated to the poor for this area, which formerly had houſes built upon it? Two objections are made, *Firſt*, that by law no corporate body is rateable to the poor. This objection is founded upon what fell from Mr. Juſtice *Yates* in the caſe of *Rex* verſus Inhabitants of *St. Bartholomew* the *Leſs*, *Trinity* term 9 *Geo.* 3. *B. R.* But ſuch opinion is not ſupported by any caſe or reaſon; on the contrary, it has been decided, that corporations, having lands, may be rated, and have been conſidered as *inhabitants* in reſpect of ſuch lands. 2 *Inſt.* 703. Lord *Coke* in his expoſition of the ſtat. 22 *Hen.* 8. *c.* 5. for the repair of bridges, commenting upon the word *inhabitants*, with reſpect to what perſons are included under that deſcription, ſays, "every "*corporation* and body politic having lands, *&c. quæ propriis manibus poſſident et habent*, are *inhabitants* within the purview of this ſtatute. If they are inhabitants as to the repair of bridges within the purview of the ſtat. 22 *Hen.* 8. they are equally ſo as to rates made under the ſtat. 43 *Eliz.* for the relief of the poor. In *Thurſfield* verſus *Jones*, Sir *Thomas Jones*, 187. the court held, that the maſter and wardens of the company of wax-chandlers were chargeable to the repairs of the church in reſpect of their *corporate* lands. It is clear from theſe two caſes, that

corporations having lands in their occupation, may be charged to the repair of bridges, and to church rates. 1774.

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With reſpect to the opinion of Mr. Juſtice *Yates* in *Rex* verſus *St. Bartholomew* the *Leſs*, the court did not determine that caſe upon the ground of the governors, &c. not being rateable as a corporation; but becauſe there was no perſon belonging to the hoſpital, who could properly be called an inhabitant or occupier. Here the maſter and fellows occupy the area in queſtion, and have the benefit of it; and the remedy of diſtreſs is open if they refuſe payment.

The *ſecond* ground of objection is, that theſe areas are in ſuch a ſtate as to yield no profit. But in point of fact they do yield profit; for they render the ſituation more healthy, and therefore in more requeſt. But the yielding or not yielding profit is not the conſideration that renders them rateable, but the circumſtance of occupation.—He admitted that the rate upon the butler's houſe, and upon the porter's lodge, ought to have been made upon them perſonally, and not upon the college.

Mr. *Dunning* and Mr. *Pemberton contra.*

Corporations are not rateable, becauſe the remedy of impriſonment, upon failure of diſtreſs, is impoſſible: and the remedy of diſtreſs alone inadequate. As to church rates, they differ from the preſent caſe, for we are now upon the poſitive words of an act of parliament; and according to *Skin.* 27. in the caſe of *Thurſfield* verſus *Jones*, the queſtion, whether a corporate body was rateable to the church rate or not, was not before the court. Corporations were not in the contemplation of the legiſlature under the ſtat. 43 *Eliz. c.* 2. The word *inhabitants*, in that ſtatute, means inhabitants that can be *committed* upon failure of a *diſtreſs*. It is not material what other deſcription of inhabitants may be found in Lord *Coke* or elſewhere: they do not apply to this caſe. The word inhabitants, in this act of parliament, was only introduced to make perſonal property liable which did not lie in occupation. It is true, poſitive proviſions may make corporations liable: and perhaps without ſuch poſitive proviſion, ſome corporations may *ſub ſilentio* have ſubmitted to be rated to the poor. But neither of theſe apply to the preſent caſe.

The caſe of *St. Luke's* hoſpital ſhews, that nothing can be rated which does not yield a profit. The advantages gained by this area are juſt like thoſe which were gained to *St. Bartholomew's* hoſpital by their area. But with regard to the profit

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accruing from it, the ſubject-matter excludes the poſſibility of rating it: for nothing is more apparent than that where property is the ſubject of a rate, the value of it muſt be certain, becauſe the meaſure of the profit is the meaſure of the rate. But here nothing is or can be received, and therefore there can be nothing to pay.

Lord *Mansfield* aſked if any inquiry had been made into the fact of corporate bodies being rated, ſuch as the *South-ſea* houſe, *India* houſe, &c. Mr. *Mansfield* mentioned the *Barbers' Company* being rated for their hall. Mr. *Wheeler*, the corporation of *Coventry*: and Mr. *Lucas* added that many of the *Companies* of the city of *London* were rated, and the only queſtion had been whether over-rated or not.

Lord *Mansfield*.

This is a queſtion of a great deal of conſequence.—And the uſage under the ſtatute 43 *Eliz. c.* 2. is very material: for great care muſt be taken to get at certainty in determinations, and to avoid overturning ſettled practice. It was that conſideration which made me aſk how the fact was, with regard to corporations. For if corporations have been uſually rated all over the kingdom for above a century, there will be little inconvenience in adopting that uſage. If on the contrary they have not, it will be a ſtrong argument in ſupport of the objection, that they are not rateable.

* 2 *Burr.* 1064.

In the caſe of *St. Luke's* * hoſpital, I recollect that I put it upon this queſtion; "Was there any body there who could be "rated as *occupiers*?" In that caſe the difficulty aroſe from a matter of ſubſtance, not form: for they could find nobody to rate. There were three ſorts of perſons only who could be charged as occupiers: 1ſt. The ſervants of the hoſpital: 2dly. The poor madmen who were the objects of the charity: and 3dly. The Truſtees. With regard to the firſt, a clear diſtinction was taken between them and the officers of other charitable foundations, ſuch as *Chelſea* hoſpital, who have been held rateable, not as ſervants of thoſe charities, nor as inhabitants of the ordinary lodgings; but as having ſeparate apartments, which were conſidered in the light of dwelling-houſes. 2. As to the poor madmen there could be no doubt of their not being rateable. 3. The next were the truſtees; but it being ſtated in the caſe that they were *mere* nominal truſtees for the poor objects of the charity, they were held upon that ground not to be rateable. Upon looking

looking into the note of that case, I find I observed, that if there were a fourth description of persons who might properly be charged as occupiers, they would not be included in or affected by the judgment which the court was about to give. 1774. REX *versus* GARDNER

Then came the case of *St. Bartholomew* *, and the grounds upon which that case was determined coincide exactly with the reasoning in the case of *St. Luke*. In the case of *St. Bartholomew* it was stated, that *Henry* the 8th in the 38th year of his reign granted all the said hospital to the corporation of *London*, and directed that it should be for the use of the poor. That after the fire of *London*, several houses were made in the hospital for the benefit of the citizens of *London*, who were then first charged to the poor rates, as occupiers of those houses. That in the year 1730, some of the ancient buildings together with some of these houses were pulled down: that since that time four large piles of building had been erected, amongst the rest one containing a hall for the governors to meet in, &c. That in 1758 the officers of the hospital were first rated to the poor, owing to the opinion given in the case of *Chelsea* hospital. In 1766, the quadrangle of the hospital being completed, the governors pulled down eighteen houses to make an area for the benefit of the patients; for which area the governors were rated. And the question was, "Whether the governors were or were not "rateable for this quadrangle and area?" From these facts it appeared that in its origin it was for the benefit of the poor, and though after the fire of *London*, houses were built upon the ground for the use of private individuals, who as occupiers of those houses were rateable and rated; yet being returned to its original use, the use of the poor, and appropriated as a means of preserving their health, without any profit to the corporation, the court held that the governors, who were merely trustees for the poor, ought not to be rated for it. Therefore I am satisfied with my own opinion in saying, that the grounds and reasoning in the two cases of *St. Bartholomew* and *St. Luke* are alike. The principle is this, that by the stat. 43 *Eliz. c.* 2. no man can be rated except as an occupier or inhabitant. Mr. Justice *Yates* indeed started a doubt, whether a corporation could be rated as inhabitants or occupiers, and did say, I believe, what has been mentioned, namely, that a corporation cannot be an inhabitant or occupier. This would have been a great authority, if the opinion had been given with consideration; but it was immediate, without time to reflect on it. But that point was not essential

* 4 *Burr.* 2435.

1774. to the deciſion, and all the court agreed in the determination of the caſe upon the other ground.

Rex verſus Gardner. In this caſe, the queſtion is, whether a corporation ſeized in fee for their own profit, is rateable or not; which is a very different queſtion, and depends upon this point; whether in law a corporation may not be conſidered as occupiers or inhabitants? By the ſtatute of 43 *Eliz. c.* 2. all lands and all real property are rateable to the poor, and muſt have, except in the caſes juſt mentioned, occupiers and inhabitants in conſideration of *tax*: therefore if a man has no tenant, if he is ſeiſed of lands, *&c.* in fee, he is ſaid to occupy them himſelf or by his bailiff, *&c.*

Moſt of the old colleges are extraparochial, and upon that ground they are not rateable. But except upon that foundation there has been no inſtance cited that a corporation is exempted from this tax; and I can find no authority in point of law which ſays they cannot be rated. But there are ſome, that go very far to prove the contrary. The *firſt* I ſhall mention, though not the moſt ancient, is the *Learnington* [illegible] *company* verſus *Naylor*, reported in 2 *Mod.* 185. Sir *Thomas Jones* 85. 1 *Ventr.* 311. and 3 *Keble* 719. which was a diſtreſs for hearth-money: there was no doubt or queſtion in that caſe whether as a corporation they were rateable or not; but whether they could properly be ſaid to be the occupiers; the houſes for which the tax was levied never having been finiſhed. The court held they were. The authorities from 2 *Inſt.* 703. and 1 *Jones* 187. ſhew, that corporations are rateable both as inhabitants and as occupiers: and if liable in reſpect of the repairs of bridges and churches, they are equally ſo within the purview of the ſtat. 43 *Eliz. c.* 2.

The next objection made to this order is, that theſe areas yield no profit, and therefore ought not to be rated. The anſwer to that is, that the value is in the judgment of the aſſeſſors. If land undergoes any alteration, the aſſeſſors muſt take all the circumſtances into their conſideration when they are about to fix the value: It would be an abſurd rule to ſay, that lands not covered with houſes, ſhould pay the ſame as they did when houſes were ſtanding upon them. The rates muſt be according to the value of the thing to be rated; and the duties increaſe according to the increaſe of agriculture or improvement. But it ſeems a very extraordinary thing for the college to ſuppoſe that they are to take in all theſe lands and pay nothing for them. I do not ſay what value is to be ſet upon them, nor

will this determination give a ſanction to the particular value fixed by the preſent rate: but they muſt be of ſome value; and whatſoever the *quantum* may be, I am of opinion that the college in its corporate capacity is rateable in reſpect of it. 1774. REX *verſus* GARDNER.

Mr. Juſtice *Aſton*. I concur. The premiſſes in queſtion muſt be of ſome value: and as to the *quantum* it is the province of the overſeers to decide, not the court.—I have no idea but that a *corporation* may be *occupiers*: as ſuch, they may have inſpection of the rates; and upon an application to the court for that purpoſe, it would be no anſwer to ſay, they are an inviſible body; for they may inſpect them by their ſervants and the court would puniſh a refuſal by attachment.—As to the *remedy* of levying a duty upon a corporation; the books all agree that it can be levied, though they differ in the mode. *Sheppard* in his treatiſe upon corporations ſays, "If a ſum of money be to be levied "upon a corporation, it may be levied upon the mayor or chief "magiſtrate, or upon any perſon being a member of the corpo- "ration." The words are taken from *Styles* 367. and are what was ſaid by *Rolle* C. J. in the caſe of the town of *Colcheſter*.—But 1 *Vent.* 351. in the caſe of the City of *London* concerning the duty of water-bailage is different, and is thus: "Note, It "was ſaid, that for a duty or charge upon a corporation, every "particular member thereof is not liable; but proceſs ought to "go in their public capacity." And this is the right law. In *Thurſfield* verſus *Jones*, *Skin.* 27. the corporation were cited not by their *proper* names, but in their *politic* capacity: and the court ſaid, "if the company had neither land or goods there "was no way to make them appear: but if they ſtood out, "then they muſt lie by the heels in their natural capacity." Therefore the idea that a corporation is not liable to be rated, or amenable by proceſs in reſpect of a rate is not well founded.

By a late act 17 *Geo.* 2. *c.* 38. the remedy of diſtreſs is extended beyond the particular pariſh, into other precincts, and even into other counties. So that their property is anſwerable though they cannot perſonally be puniſhed.

Therefore I am clearly of opinion that as a corporation they are liable to be rated, and that the order of ſeſſions is good: though, in reſpect of the *quantum*, an appeal is ſtill open if the college think themſelves aggrieved. Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

The court ordered that the order of ſeſſions be quaſhed ſo far as the ſame relates to the porter and butler therein mentioned,

1774. ed, and that the reſt and reſidue of the matters therein contained be affirmed.

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*Tueſday, June 7th.*

## The Mayor of LYNN *verſus* TURNER.

CASE againſt a corporation for not *repairing* a *creek* into which the tide of the *ſea flowed and reflowed* (but not ſaying it was a *navigable river*), as *from time immemorial* they had been uſed, the action lies, tho' no ſpecial damage be ſtated. And ſaying "*as from time immemorial they had been uſed*" is well enough, without alleging that they were bound, *&c. ratione tenuræ*, or other ſpecial cauſe.

ERROR from a judgment of the court of *common pleas* in an action upon the caſe againſt the corporation of *Lynn Regis* for not repairing and cleanſing a certain creek or fleet called *Dowſhill fleet* into which the tide of the ſea was accuſtomed to flow and reflow as from *time immemorial they had been uſed*, whereby the ſea was prevented from flowing therein, ſo that the ſaid creek was rendered unnavigable, and the plaintiff obliged to carry his corn round about. The declaration conſiſted of nine counts: the *ſecond* count ſtated *no ſpecial damage*, but only charged generally, that the plaintiff had loſt the uſe of his navigation. Judgment by *nihil dicit* and damages upon a writ of inquiry.

Mr. *Baldwin* for the plaintiff in error. If any one count is bad, the judgment may be ſet aſide. Upon the face of this record it appears that the *locus in quo* is a navigable river, where the tide flows and reflows, and the ſecond count is general without any ſpecial damage being ſtated. If ſo, the injury complained of is not the ſubject of an action but of an indictment. For wherever a river flows and reflows it is in the nature of a highway, and is common to all. *Davis* 56. *Sid.* 149. 1 *Mod.* 105. 1 *Salk.* 357. and where an injury is received by a nuiſance or obſtruction in a highway, it is incumbent on the party to ſhew a particular damage: otherwiſe an action does not lie. 1 *Inſt.* 56. *Carth.* 191. *Cro. Eliz.* 664. 5 *Co.* 73.

Lord *Mansfield*. *Ex facto oritur jus*. How does it appear that this is a navigable river? The flowing and reflowing of the tide does not make it ſo; for there are many places into which the tide flows that are not navigable rivers; and the place in queſtion may be a creek in their own private eſtate.

Mr. *Baldwin*. Then it was incumbent on the plaintiff to ſhew a ſpecial reaſon or tenure why the corporation ought to repair, for they are not bound of common right. 2 Lord *Raym.* 1089. 1 *Salk.* 360. S. C.

Lord

Lord *Mansfield*. It is here alleged that the corporation have from time immemorial been uſed to repair. It ſtates, therefore, that they are bound by preſcription, and it might be the very condition and terms of their creation or charter.

1774.

*Mayor of* LYNN *verſus* TURNER.

The three other judges concurred.

Let the judgment be affirmed.

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## HARWOOD *verſus* GOODRIGHT, Leſſee of ROLFE.

*Tueſday, June 7th.*

A ſubſequent will, though it be found to contain a different diſpoſition from a former, if the particulars of that difference be unknown, is no revocation of ſuch former will.

ERROR from the *Common Pleas* upon a judgment in ejectment, of a ſet of chambers in *Lincoln's-Inn*. The cauſe was tried before Sir *William de Grey*, Lord Chief Juſtice of the court of *Common Pleas*, at the ſittings after *Trinity* term 1773; when the jury found a ſpecial verdict, ſtating in ſubſtance as follows:

That *John Lacy* of *Lincoln's-Inn* Eſq; on the 16th day of *April* 1748, being ſeiſed in fee of the chambers and premiſſes in the declaration of ejectment mentioned, and poſſeſſed of a conſiderable perſonal eſtate, and alſo entitled to the intereſt of 10,000*l.* by virtue of the marriage ſettlement of his father of the 3d of *April* 1688, and a private act of parliament, (by which the ſaid ſum of 10,000*l.* was directed to be raiſed and laid out in the purchaſe of lands, and which was raiſed accordingly, but never inveſted in land,) made his will in writing duly atteſted to paſs real eſtates; and did thereby deviſe as follows; that is to ſay, "I *John Lacy*, of *Lincoln's-Inn* in the county of *Middleſex*, do "make this my laſt will and teſtament with my own hand, as "follows; I give, deviſe, and bequeath, all my real and perſonal eſtate, of what nature or kind ſoever, or whereſoever it "be, unto my dear and well-beloved friend Mrs. *Frances Harwood* now of *Maiden Lane* in the pariſh of *Covent Garden*, *Weſtminſter*, and her heirs, executors, adminiſtrators, and aſſigns for ever; deſiring her to pay certain legacies: and I do "hereby conſtitute and appoint the ſaid Mrs. *Frances Harwood* "to be the ſole executrix of this my laſt will and teſtament, "revoking all others by me heretofore made." That in the ſummer of the year 1756, the ſaid *John Lacy* of *Lincoln's-Inn*, being in like manner ſeiſed as before mentioned, did make and duly publiſh *another* will and teſtament in writing, in the preſence

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ſeiſed of three ſubſcribing witneſſes, who duly atteſted the ſame. That the *diſpoſition* made by the ſaid *John Lacy*, by the ſaid will of the year 1756, was *different from the diſpoſition* in the ſaid will of 1748; *but in what particulars is unknown to the ſaid jurors*; but the ſaid jurors ſay, that they do *not* find that the ſaid teſtator *cancelled* his ſaid will of the year 1756, or that the ſaid defendant deſtroyed the ſame; but what is become of the ſaid will, the jurors aforeſaid are altogether ignorant. That the ſaid teſtator *John Lacy* Eſq; died in *June* 1767 ſeiſed in fee of the ſaid premiſes in the ſaid declaration mentioned, without iſſue, and was never married. And that the ſaid *Elizabeth*, the wife of the ſaid *William Rolfe*, the leſſor of the plaintiff, is the neice and heireſs at law of the ſaid teſtator *John Lacy*.

The queſtion was, Whether the deviſe in the will of 1748 to the defendant was revoked by the will found to be executed in 1756?

*De Grey* Chief Juſtice, *Gould* and *Nares* Juſtices gave judgment in the *Common Pleas* for the leſſors of the plaintiff againſt the opinion of Mr. Juſtice *Blackſtone*; upon which judgment this writ of error was brought.

Mr. *Davenport* for the plaintiff in error. This caſe muſt be decided upon two or three leading principles.

*Firſt*, That as there is a clear indiſputable title in Mrs. *Harwood* under the will of 1748, the leſſor of the plaintiff in ejectment muſt ſhew a ſubſequent title equally clear and indiſputable.

*Secondly*, A ſubſequent ſubſtantive independent will of lands is not in itſelf a revocation of a former will, nor will operate as ſuch, unleſs it contain expreſs words of revocation, or a deviſe of the ſame lands repugnant to and inconſiſtent with ſuch former diſpoſition. *Cro. El.* 721. *Cro. Jac.* 94. and the caſe of *Hitchen* verſus *Baſſet*, reported in 1 *Show.* 537. *Hardr.* 374. 2 *Salk.* 592. *Comberb.* 90. and 209. 3 *Mod.* 203. *Show. Parl. Caſ.* 146. where this point was at laſt finally ſettled and adjudged.

But *thirdly*, ſuppoſe a ſubſequent independent will of lands would revoke a former, yet it muſt appear what the contents of ſuch latter will are. For the mere finding another will does not *ex vi termini* find a repugnant or different diſpoſition: and twenty deviſes of the ſame lands may ſtand together, unleſs they are inconſiſtent.

Lord

Lord *Mansfield* asked the counsel, if they had considered whether in point of law the court could grant a *venire facias de novo* after a writ of error brought: and instanced two cases, *Haswell* versus *Challice*, and *Rex* versus *Kynaston* where the House of Lords had done so: adding, that the House of Lords could not, as a court of error, have such jurisdiction, unless the court of *King's Bench* had the same. 1774. HARWOOD versus GOODRIGHT.

Mr. Serjeant *Hill contrà*. The notion and doctrine of wills, arises from the civil law, and is borrowed from it: The notion respecting express revocations was established by the stat. 32 *H.* 8. *c.* 1. before which statute there could be no will of lands except by custom. But presumptive revocations existed before that act. The notion that a subsequent will is a revocation of a former, is founded on the nature of the instrument itself; because if it were the intention of a testator that his first will should stand at the time of making a second, the latter would be a codicil, and not a will. Therefore, wherever there are two independent wills, the latter is a revocation of the former. *Swinburne* 15. No man can die with two testaments, because the latter does always infringe the former, 523. *S. P. Perkins, sect.* 478. *Shep. Touchstone* 410. *Hardr.* 376. *per Hale C. B.* Apply this doctrine to the present case. It is found that the will of 1756 was duly attested to pass real estates, and that the testator, who was eminent in the law, had no real estate but the chambers in *Lincoln's Inn*. This is strong evidence of a change of intention in the testator, and consequently sufficient to prove, that the new disposition was different from the former: otherwise it was nugatory to make it. At least the execution of the second will renders it very doubtful, whether Mrs. *Harwood* is entitled to any thing; and it is a settled rule, that where it is uncertain who is to take, the heir at law shall be entitled. The case of *Hitchins* versus *Bassett* is in favour of the defendant in error: for the grounds upon which the court decided that case were, that there was no proof of any change of intention whatsoever in the devisor, or that the second will in any way related to or affected his lands. But in the present case, it is sufficiently found by the *mode* of devising, that the second will did relate to lands, and to the very estate in question; because he had no other real estate; and it is expressly found that the disposition of 1756 is different from the disposition in 1748. Therefore, under all the circumstances, this finding amounts to an express revocation of the will in 1748. *Friday, June 10th.*

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Lord *Mansfield*. Let it ſtand for a ſecond argument: but I will juſt ſtate the ſhort compaſs in which the queſtion lies. Though, as to perſonal eſtate, the law of *England* has adopted the rules of the *Roman* teſtament, yet a deviſe of lands in *England* is conſidered in a different light from a *Roman* will. For a will in the civil law was an inſtitution of the heir. But a deviſe in *England*, is an appointment of particular lands to a particular deviſee; and is conſidered in the nature of a conveyance by way of appointment; and upon that principle it is, that no man can deviſe lands which he has not at the date of ſuch conveyance. It does not turn upon the conſtruction of the ſtat. 32 *H.* 8. *c.* 1. which ſays, that "any perſon having lands, *&c.* "may deviſe." For the ſame rule held before the ſtatute, where lands were deviſable by cuſtom.

It is upon the ſame principle, but carried too far by ſubtlety, that there have been revocations determined contrary to the intent of the teſtator; as where he has afterwards made a feoffment or the like; becauſe that has been conſtrued a new appointment. Such is the difference between the *Roman* will and a deviſe of lands in *England*.

But it may be ſaid, that if there is a complete ſecond will, it cannot do otherwiſe than revoke a former: for if it is only a variation or *ſubtraction* from a former will, it is in the nature of a codicil. Now with regard to land, a ſubſequent deviſe of land muſt be inconſiſtent with a former deviſe of the ſame land, or the firſt will ſtand as a good ſubſiſting deviſe; for if the teſtator gives it to *A.* and does no other act which will transfer it to a third perſon, the original deviſe to *A.* remains good. There muſt therefore be an inconſiſtent diſpoſition in the whole or in part; if there be an inconſiſtency in part, it is a revocation as to that part only. As where a teſtator deviſes an abſolute eſtate in fee to *A.* and afterwards, by a ſubſequent deviſe, gives him only an eſtate-tail in the ſame land; it is a revocation to the extent of the difference between an eſtate-tail and an eſtate in fee.

In the preſent caſe, the queſtion ariſes upon certain facts found by the ſpecial verdict: but the argument has gone upon preſumption only: and much has been ſaid which would have been very fit for the jury to have conſidered. The opinion of the court muſt be guided by concluſions drawn from the facts ſtated, which are; That the defendant had a title by deſcent: but a will is found which defeats that title. It is not found that

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that this will was revoked. But the jury find that the teſtator made a ſecond will. It is ſtated that the diſpoſition made by this ſecond will is *inconſiſtent* with the deviſes contained in the former? No; but they find it to be *different*: and if the verdict had reſted there, there might have been a ground of argument to ſay, that *different* was a general finding applicable to the whole will, and therefore it muſt mean *totally* different. But the jury go on to ſay, that *they do not know wherein the difference conſiſts*. If the jury cannot find it, the court in ſuch caſe cannot preſume the difference. The jury might have had evidence to prove an inconſiſtent diſpoſition or circumſtances to lay a fair foundation for preſuming it to be ſo, as ſpoliation or the like: but no ſuch circumſtance appears; they merely find a ſecond will, and as to what alteration it made in the former, they ſay they are totally ignorant. How then can the court ſay it? For the court cannot preſume any thing. The mere circumſtance of making a ſecond will is not in itſelf a revocation of a former: for the teſtator may cancel ſuch latter will, and it has been ſettled that if a man by a ſecond will even revoke a former, yet if he keep the firſt will undeſtroyed, and afterwards deſtroy the ſecond, the firſt will is revived. In this caſe the jury do not ſay a ſyllable as to the ſecond will being in *eſſe* at the time of the teſtator's death. The matter ſeems to me to lie here. It muſt be ſhewn that upon this ſpecial verdict the jury have found the ſecond will to be in ſome particular repugnant to or inconſiſtent with the firſt: whereas the only reaſon that has been aſſigned for ſuppoſing it to have been different from the firſt, is that the teſtator made another will.

Afterwards in *Mich.* Term it was argued by Mr. *Wallace* for the plaintiff, and Mr. *Lee* for the defendant, when Lord *Mansfield*, after ſtating the caſe, delivered the opinion of the court as follows:

Each party inſiſts that upon this ſpecial verdict there is a title found in their favour: the plaintiff (now defendant in error) ſays there is a clear title for him, as *heir at law*; the defendant, that there is a clear title for her, as *deviſee*: and neither party has contended, that there is any ſuch defect or repugnancy in this verdict, as to render it uncertain for the court to proceed upon it, and I think rightly: for there is a title found for one or the other. Nor has either ſide moved for a *venire facias de novo*; if they had, this court as a court of error could have granted it.

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In considering this special verdict, the duty of the court is to draw a conclusion of law, from the facts found by the jury; for the court cannot presume any fact from the evidence stated. Presumption indeed is one ground of evidence; but the court cannot presume any fact. In case the defendant had been proved to have destroyed this last will, it would have been a good ground for the jury to find that this was a revocation. But the jury on the presumption must have found the fact. So with regard to all the other circumstances; such as the presuming it to be in her hands, and that there were three attesting witnesses to the will: these would have been proper for the jury to have considered; but we are confined to the facts found by them: which are as follow:

They have found the defendant to be heir at law of *John Lacy*: as such he would have a clear title if there were no other claimant by settlement or will. The title of an heir at law is not to be defeated by conjecture, ambiguity, or uncertainty; and even where there is proof of a will having existed, which however does not appear, the court cannot go into conjecture what it is probable the testator may have done by that will; but it must be shewn to contain an actual express devise which disinherits the heir at law. But in the present case, the jury have found a clear title against the heir at law: for they have found a good subsisting will, properly attested, and an express devise to the plaintiff in error, concerning the construction of which there is no doubt. For even in the case of an actual devise, a proper meaning, as I have before stated, must be found to disinherit the heir at law. Here a clear devise is given against him: therefore he must get rid of this title and prove his own by other facts to be found in this verdict; which if it were the truth of the case he might do, either by shewing that the will under which the devisee claims is revoked, or that the testator had no power to devise. In this case there is no dispute as to the testator's power to devise: therefore a revocation must be shewn, and the mode of doing that is by another will. But that is not all; for he must shew in fact, that it was *revoked* by another will which *subsisted* at *the death* of the testator; because if a testator makes one will and does not destroy it, though he makes another at any time virtually or expressly revoking the former, if he afterwards destroy the revocation, the first will is still in force and good.

If a subsequent will, either virtually or expressly revoking a former will, be destroyed, the former, if subsisting, is revived.

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But what is there in this caſe to ſhew, that the will of 1756 ever revoked the deviſe of the chambers in queſtion? The plaintiff in the original cauſe reſts it on two grounds: Firſt, that there is a contrary deviſe, if it can be made out; the clear anſwer is, if there is a contrary deviſe, it is againſt the heir. But it is contended, that, becauſe the jury ſay there was a different diſpoſition, the court is to preſume that there was a different diſpoſition of the ſubject-matter in queſtion. Properly ſpeaking, *another* will cannot exiſt without there being a difference: becauſe, if it be exactly the ſame, it is no more than a duplicate or a republication of the firſt will; the jury therefore finding it to be another will, *ex vi termini* ſay, it was different.

It is neceſſary in a perſonal teſtament to make an executor, but not ſo to a deviſe of lands, which muſt be revoked expreſsly by a ſubſequent will. The jury here have not found any revocation of the former will: nor is there any in point of law; for the mere circumſtance of making another will is not virtually a revocation of a will of land. I can ſee no difference between the caſe of *Killigrew*'s will and this. For in that caſe, the jury, by ſaying there was *aliud teſtamentum*, certainly found a difference: here they ſay it was different, but add, that they do not know in what the difference conſiſts: this ſpecial verdict therefore does not find a revocation.

The ſecond ground which the defendant reſts upon is this; that it is uncertain whether the will be revoked or not; and where the heir at law claims, his title ſhall never be taken away by an uncertainty. But this is all a fallacy; for here the deviſee does not ſet up an uncertainty; ſhe ſhews a clear title under the will of 1748. On the contrary it is the heir at law who ſets up an uncertainty againſt her. Upon the whole, I think the jury have not expreſsly found that the deviſe of the chambers in the will of 1748 was revoked by the will in 1756. Therefore,

Let the judgment be reverſed.

Afterwards, upon an appeal to the Houſe of Lords, the judgment of the court of *King's Bench* was affirmed: the barons of the Exchequer attended (except Mr. baron *Perrot*) and were all of opinion with the Judges of the *King's Bench*. *Paſch.* 15 *Geo.* 3.

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## ST JOHN *versus* Bishop of WINTON.

*Same day.* One possessed of three species of estates in the county of *H.* viz. one by articles *wholly executory*, another *executory in part* and a third (being an *advowson*) completely *executed* by a *recent* conveyance, devises to his wife as follows: "All the "manors, "messu- "ages, *ad-* "*vowsons* "and here- "ditaments in "the coun- "ty of *H.* "for the "*jurch so* "whereof "I have "already "*contracted* "and "*agreed*, "or in lieu "thereof, "the mo- "ney ar- "sing by "the sale "of my "real es- "tate in "the coun- "of *L*;" (with directions for completing the contracts).—The advowson, the purchase of which was completely executed before the making of the will, shall pass.

ERROR from the *Common Pleas* upon a judgment in *Quare impedit* of the advowson of the church of *Mottisfont* alias *Motson East Dean*, and *Lockerly* in the county of *Southampton*, claimed by the plaintiff in error, under a grant made to him in fee, 2d *December* 1766, by Lady *Broughton Delves* widow of Sir *Brian Broughton Delves* deceased; who claimed such advowson as *devisee under the will of her late husband Sir Brian*. The cause was tried at the assizes holden for the county of *Southampton* on the 26th of *July* 1773, when the jury found a special verdict in substance as follows:

"That on the 13th of *June* 1763, Sir *Brian* contracted by "articles of agreement with Sir *Thomas Gatehouse*, for the purchase of the manor of *Upper Clatford* in the county of *Hants*, in "consideration of 10,000*l*; the purchase money to be paid, and "the conveyance completed, on or before the 25th of *March* "1764. That, on the 30th of *October* 1763, Sir *Brian* further "contracted by articles with the honourable *Thomas Pitt*, for "the purchase of the manor of *Abbots Ann*, and also the advowson of the parish church of *Abbots Ann* in the county of "*Southampton*, in consideration of 24,000*l*; 7000*l*. being "*paid* in *part*, and the remaining 17,000*l*. to be paid at the "time of completing the purchase and executing the conveyance; which was to be on or before the 25th of *March* 1764. "—That on the 10th of *February*, 1764, Sir *Brian* purchased "of *Thomas Fuller* and others, and took a conveyance to himself "in fee of the advowson * of *Mottisfont* in the county of *Hants*, "in consideration of 2,500*l*. the money being paid down and "the deed executed on that same day."

That being so seised in fee of the said advowson of *Mottisfont*, and being entitled in equity to the several estates contracted for by the said articles, which then remained to be carried into execution, and being seised in fee of divers manors and estates in the county of *Stafford*, and of certain copyhold estates of inheritance in *Suffolk*, and of a small freehold estate in the county of *Salop*, and seised for his life (under his marriage settlement) of divers manors and estates in the county of *Chester*, with remainder to his first and other sons successively in tail male, (subject to her jointure of 1000*l*. a year, and to one other jointure of 1000*l*. a year to his mother,) with reversion to himself in fee; and being likewise seised in fee of

* The *advowson* in question.

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a real eſtate in the county of *Lincoln*, which he had contracted to ſell by articles to *George Foſter Tuffnell* Eſq. in conſideration of 27,000*l.* which was to be paid on completing the purchaſe; DID, on the 21ſt *May* 1764, duly make and publiſh his laſt will and teſtament; wherein, after bequeathing his dwelling-houſe in town, together with his jewels, plate, houſehold furniture, *&c.* to his wife Lady *Mary Broughton Delves*, her heirs, executors and adminiſtrators reſpectively, to and for her and their own proper uſe and benefit; he proceeds thus:

Clauſe upon which the queſtion ariſes.

"*Alſo I give, deviſe, and bequeath to my* ſaid wife and her heirs, to and for her and their own proper uſe and benefit, *all the manors, meſſuages,* ADVOWSONS, *farms, lands, tenements, hereditaments, and real eſtate whatſoever, ſituate and being in the county of* HANTS, FOR THE PURCHASE WHEREOF I HAVE ALREADY CONTRACTED AND AGREED, *with all and every the appurtenances, and all my right, title, and intereſt, in and to the ſame;* OR IN LIEU THEREOF *the whole money ariſing by the ſale of all my real eſtates in the county of Lincoln, and* SUCH FURTHER SUM AND SUMS *of money as together with the money ariſing from ſuch ſale ſhall be ſufficient to enable my ſaid wife or her heirs to* COMPLETE *the ſeveral* CONTRACTS *I have made as aforeſaid, for the purchaſe of the* SAID ESTATE AND PREMISES *in the county of Hants; in truſt nevertheleſs to* COMPLETE *the ſaid* PURCHASES, *and to procure and take* CONVEYANCES *of the ſame eſtates, in the county of Hants, to her and their own proper uſe and benefit.*" He alſo gave to truſtees and their heirs, all and ſingular *his* manors, meſſuages, *advowſons*, farms, lands, tenements, tithes, hereditaments and real eſtates whatſoever, ſituate, ariſing, and being in the counties of *Stafford* and *Cheſter*, or either of them, to the uſe of his brother *Thomas Delves* for life, with remainder to his iſſue in ſtrict ſettlement, with divers remainders over. And then, after certain pecuniary legacies, the teſtator gave all the reſidue of his perſonal eſtate to his brother the ſaid *Thomas Delves*.

"That the *ſaid articles of* 13*th June, and* 30*th of October* 1763, were *in force at the time of making his ſaid will;* and that ſince his death, the reſpective premiſes had been conveyed to Lady *Broughton Delves*. That at the time of making his ſaid will, Sir *Br[illegible]* was ſeiſed of *no other advowſon in the* county of *Southampton*, except the *advowſon of Mottiſfont*, compriſed in the conveyance of the 10th of *February* 1764; nor had he *contracted* for the purchaſe of any manor, meſſuage, *advowſon*, &c. in the county of

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of *Southampton*, which *reſted in contract*, other than thoſe mentioned in the articles of 13th *June* and the 30th of *October* 1763: Nor was he ſeiſed of or entitled unto any *advowſon* or *advowſons* in the *counties of Stafford or Cheſter*. That, on the 1ſt of *February* 1766, the ſaid Sir *Brian* died without revoking or altering his ſaid will, and without iſſue: leaving *Thomas Delves* his only brother and heir at law, now Sir *Thomas Broughton*. That the ſaid Sir *Thomas Broughton*, on the 6th *June* 1772, conveyed the advowſon of *Mottiſfont* to *Robert Hill* clerk and his heirs for the ſum of 3,825 *l.*

The queſtion ariſing upon this verdict was, "Whether the "*ſaid advowſon of the church of Mottiſfont paſſed to Lady* "*Broughton Delves the teſtator's widow, by virtue of that clauſe* "*in his will, whereby the teſtator gave and deviſed to his* "ſaid wife all manors, meſſuages, *advowſons*, &c. in the county "of *Hants for the purchaſe whereof he had contracted and* "*agreed*: for if not, then the ſaid advowſon, being undiſpoſed "of by the ſaid will, deſcended to the ſaid Sir *Thomas Broughton* "as heir at law to the ſaid teſtator?"—The court of *Common Pleas* were of opinion, that the advowſon of *Mottiſfont* did *not* paſs by this clauſe to Lady *Broughton Delves*; and gave judgment for the now defendant in error, upon which judgment this writ of error was brought. This caſe was argued twice; firſt in *Eaſter* term 1774, by Serjeant *Walker* for the plaintiff, and Serjeant *Glynn* for the defendant, and now in this term, by Mr. *Mansfield* for the plaintiff, and Mr. *Dunning* for the defendant.

For the plaintiff it was contended, that this was an *expreſs* deviſe to Lady *Broughton* of the advowſon of *Mottiſfont*, it being ſituate in the county of *Hants*, and not only *contracted for* but *actually conveyed* to the teſtator *before* the making of his *will*: that a contrary conſtruction would render the word "*ad-*"*vowſons*" in the *plural* number of *no effect*; the teſtator not having *contracted* for any *other advowſon* in *Hampſhire* except the advowſon in queſtion, and that of *Abbots Ann*: and, therefore, that the rule of law, which in the expoſition of all inſtruments, and more eſpecially of wills, prefers ſuch a conſtruction as will give effect to every expreſſion in them, ought to prevail in this caſe.—To this point was cited the caſe of *Mirril* verſus *Nichols*. 2 *Bulſtr.* 176. where "a teſtator, having *two ſeveral* "*moieties* of lands by *ſeveral purchaſes* in *Kent* and in *Eſſex*, "deviſed

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"deviſed as follows: *And as to my moieties*, I deviſe *all my* "*moieties in Kent unto B.*" and made no mention of the *moiety in Eſſex*: but the court held that *both paſſed*, for the words being "*All his moieties*," the intention of the teſtator could not otherwiſe be ſatisfied. So in the caſe of *Thorpe* verſus *Thompſon*, 2 *Leon.* 120. *Ander.* 188. S. C. where *A.* purchaſed land of *B.* but *before any conveyance executed B.* ſold the land to *C.* and then *A.* conveyed to *C.* who being thus ſeiſed deviſed it thus: "I bequeath to *R.* my ſon, all my land which I *purchaſed* of *B.*" whereas in ſtrictneſs of law he purchaſed them of *A.* by virtue of the conveyance made to him by *A.* But the court held the deviſe good, it being a ſufficient deſcription of what land the teſtator meant. They cited likewiſe the caſes of *Cheſter* verſus *Cheſter*, 3 *P. Wms.* 56. *Goodright* on the demiſe of *Paul* v. *Paul*, 2 *Bur.* 1089. and *Dyer* 376. And agreeable to the doctrine laid down by theſe authorities, inſiſted, that, in the preſent caſe, the words "*contracted and agreed for*" ought *not* to be conſtrued *reſtrictive* of the *general expreſſion* "*All my manors, lands, meſſuages* and ADVOWSONS," ſo as to exclude the *advowſon actually purchaſed*; becauſe, in ſtrictneſs of language, no eſtate can be ſaid to be *purchaſed* without being *firſt contracted and agreed for*. But further, the teſtator's *intention* to deviſe the advowſon in queſtion, which ought to be the *rule* of conſtruction in this caſe, was manifeſt, from his uſing the word "*advowſons*" in the *plural* number; and again from the expreſſion "*already*" which was a ſtrong proof that he meant to include all the real property in *Hampſhire* of which he was *then* the owner. That in the common acceptation and meaning of the words "*contracted* "*and agreed for*," there was no diſtinction between *them* and a *purchaſe*, and that in equity ſuch a contract would be a very good purchaſe.

On the part of the defendant it was inſiſted, that an heir at law ought not to be diſinherited by any other than a *neceſſary implication*: that in the preſent caſe, the words "*for the purchaſe* "*whereof I have already contracted and agreed*" could not by any *neceſſary inference* be extended to relate to a purchaſe *actually completed*; nor indeed by any poſſible conſtruction whatſoever, unleſs a contract executory means the ſame as a contract actually executed. That ſuch an interpretation would go the length of making them include any purchaſe however *diſtant*, as well as one of a more *recent* date: in which caſe no line can be drawn between a ſpace of three months, and one of three-ſcore years.

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For the *reſting in contract* being a *deſignatio rei* muſt ceaſe to be applicable to an eſtate on the inſtant of the purchaſe being *completed*, or muſt continue applicable to it *for ever*.—That if no other circumſtance however was ſufficient to explain the teſtator's meaning, the words immediately following the words "*agreed* "*for*" were of themſelves deciſive: namely, "*or in lieu thereof*, "*the whole money ariſing from the ſale, &c. as together, &c. ſhall* "*be ſufficient* to *enable my ſaid wife, &c.* to *complete* the *ſeveral* "*contracts* as *aforeſaid.*" The eſtates therefore meant to be deviſed by the teſtator as included under the above deſcription, muſt of neceſſity be ſuch *only*, *the contracts for the purchaſe of which were ſtill ſubſiſting*, and which might or might not for ever remain incomplete at the option of the teſtator's wife and her heirs; the money given in *lieu thereof* amounting in the one caſe to a full ſatisfaction, and in the other to the expreſs ſum requiſite to *complete* ſuch *contracts*. Again the ſubſequent direction to Lady *Broughton*, to procure and take proper conveyances of theſe eſtates, excludes all poſſibility of ſuppoſing that the teſtator had in contemplation at the time of this deviſe, a reference to an eſtate, concerning which no *contract* was *ſubſiſting*, for *completing* the *purchaſe* of which *no money was due*, of which *no conveyance* remained to be *procured or taken*, but which had *before the making of his will* been *completed, purchaſed* by, and *conveyed to the* teſtator.—That no deduction to be drawn from the teſtator's uſing the word "*advowſons*" in the *plural* number could avail the plaintiff in this caſe; becauſe the ſame expreſſion is uſed by him in the deviſe of his *Staffordſhire* and *Cheſhire* eſtates, where it appears that he had *no advowſon* at all. On the contrary, it was plain from this circumſtance, that the teſtator meant to uſe it merely in a *general* and *comprehenſive*, not in any *particular ſenſe*.—That even the common *preſumption* that a teſtator does not intend to *die inteſtate* as to any part of his eſtates could not obtain here, as he had actually done ſo in reſpect of his eſtates in *Suffolk* and *Salop*: that there was as little ground therefore for ſupplying a diſpoſition of the advowſon of *Mottiſont* about which the will was likewiſe perfectly ſilent, as there would be of them: that in either caſe it could be founded in conjecture only; which by no rule of law is ſufficient to diſinherit an heir at law.

Lord *Manſfield*. If this queſtion had come before the court preciſely under the ſame circumſtances as it did in the caſe of *St. John*

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*John* verſus *Errington* *, the opinion given then, would have no influence upon the opinion that is now to be given. On the contrary, the judgment which has ſince been delivered by the court of *Common Pleas* would conſiderably ſhake that deciſion.

An heir at law cannot be diſinherited by conjecture. It can only be done by expreſs words, or by an implication which manifeſtly indicates the clear intent of the teſtator, upon a fair conſtruction of the whole contents of the will, to give the eſtate from him.

I have ſtruggled as much as I could to agree with the judgment of the court of *C. B.* in this caſe; and I thought yeſterday I had perſuaded myſelf to do ſo: but upon reading the whole of the will attentively, and finding the circumſtance of the money ſuppoſed in the argument to be given by way of equivalent, to be founded on a miſtake, I cannot ſatisfy myſelf to reject the words of the teſtator in this caſe. He has made uſe of the word "advowſons," and the whole diſpute is, whether the word "advowſons" ſhall be underſtood to mean *advowſons*, ſo as to convey an idea, that the teſtator underſtood the real force of the expreſſion at the time; or whether it is to be rejected, as being merely inſerted by him among other *general* words, without any particular meaning or intention annexed to it.—If it is to be underſtood as applied to theſe *two*, there is no doubt but it will include the recent purchaſe, and in that caſe there is an end of the queſtion. To be ſure, there might be caſes, where from the ſubject-matter, it ought to be rejected; but the preſent is a caſe under very particular circumſtances. It is manifeſt from the facts ſtated in the ſpecial verdict, that the teſtator's object was to buy eſtates in *Hampſhire*; and to enable him in part to do ſo, he intended to ſell his eſtates in *Lincolnſhire*: and all this was upon one plan, which he was carrying into execution, and wiſhed to complete in as little an interval as circumſtances would admit of. The dates of the ſeveral tranſactions are very material.

* *St. John* verſus *Errington*, *Hilary* term 13 *Geo.* 3. was an action of covenant for a defect of title in the conveyance of the ad of *December* 1766 (the living being then full); and on a caſe reſerved in *B. R.* the court were of opinion that the *advowſon* paſſed by the *will*, and therefore that title was good. But the deviſe reſpecting the *Cheſhire* and *Staffordſhire* eſtates, and the fact of the teſtator having no advowſon in either of thoſe counties, though he there likewiſe uſes the word "*advowſons*" amongſt other general words, made no part of the caſe then before the court.

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On the 13th of *June* 1763, he contracts for lands in *Hampſhire* to the amount of 10,000 *l*; the money to be paid and the eſtates conveyed on or before the 25th of *March* 1764.

On the 30th of *October* 1763, he articles for other eſtates in *Hampſhire*, including an *advowſon*: he *pays* 7,000 *l*. in part, and the reſidue of the purchaſe money being a ſum of 17,000 *l*. was to be paid and the conveyance executed on the 25th of *March* 1764. In the intermediate time, that is, on the 10th of *February* 1764, he *purchaſes* the *advowſon* in *queſtion*, and has an immediate conveyance made to him upon payment of the purchaſe money.

So that there are three ſpecies of eſtates which he had to diſpoſe of. *One*, by articles that reſted *wholly executory*: another by articles *not wholly executory*, nearly a third part of the purchaſe money having been paid: and a third that had been *carried* into *execution* by a very recent conveyance. On the 24th of *May* following, Sir *Brian* makes his will. Whoever drew this will muſt have been privy to theſe recent contracts: one was totally executory, one executory in part, and the third a complete contract. He thought to include the whole under one deſcription: therefore, to ſhew ſuch general intention of the teſtator, he ſays "*for the purchaſe whereof I have* ALREADY "*contracted and agreed*," not, "for the purchaſe whereof I have "ONLY contracted and agreed." He did not intend any future purchaſe ſhould paſs; but only thoſe he had recently entered into. If he had ſaid "*only* contracted and agreed," the purchaſe of Mr. *Pitt*, of which great part of the purchaſe money had been advanced, would not have paſſed; becauſe that contract and agreement was more than made, it was partly carried into execution. He puts in the word "*advowſons*". Shall the meaning of this word be excluded becauſe he has uſed the expreſſion "for the purchaſe whereof I have already contracted and "agreed?" Has he in fact leſs agreed for a recent purchaſe, becauſe he has actually completed it? In point of *intention* I think it is impoſſible to conceive that he meant to except the particular advowſon in queſtion. An argument was greatly relied on that would have been very ſtrong indeed, if it had been well founded; which is this, that he could mean only to include the *executory* contracts, becauſe he has given *in lieu* thereof the money to ariſe from the ſale of the *Lincolnſhire* eſtates. Now every equivalent muſt be ſuppoſed to be co-extenſive with the thing for which it is intended as an equivalent. It has been

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ſaid that 27,000 *l.* the money ariſing from the ſale of the *Lincolnſhire* eſtates would juſt amount to the purchaſe money of the eſtates under contract executory in *Hampſhire*. But on looking into the will, the fact does not warrant the aſſertion; for though the words are "*in lieu thereof*" which implies an alternative, yet he could not mean to ſubſtitute the one for the other; becauſe 7,000 *l.* had been paid in part of one of the eſtates; and 27,000 *l.* was the ſum that remained to be paid in order to *complete* the ſeveral purchaſes. The ſum of 27,000 *l.* therefore is in fact 7,000 *l.* ſhort of the real value and purchaſe money of the eſtates under contract; conſequently it could not be intended as an equivalent for them, but only as a fund to complete the purchaſe.

The whole queſtion depends upon this ſingle point, whether there are words in the will ſufficient to paſs the advowſon in queſtion. If there are not, the heir cannot be diſinherited. But here the word "*advowſons*" is uſed; and, in order to decide for the heir, we muſt entirely reject it. I do not think we are at liberty to do ſo: becauſe I think the teſtator meant the word "*advowſons*" ſhould have its full force and effect: and no argument ariſes from his having inſerted the ſame word in the deviſe of his other eſtates, where in point of fact there were no advowſons: becauſe his object was to diſpoſe of all he was poſſeſſed of. Therefore I am of opinion that by the word "*advowſons*," *both* the advowſons paſs.

*Aſton*, Juſtice. The great ſtreſs of argument in *C. B.* was upon the words "in lieu thereof, *&c.*" making an alternative deviſe. I think it clearly otherwiſe; and that it was intended only as a fund to complete the purchaſes which the teſtator had agreed for with Sir *T. Gatehouſe* and Mr. *Pitt*; and had no relation to the advowſon already purchaſed. Therefore I concur in opinion with his lordſhip, that by the clear intention of the teſtator, and upon the plain and manifeſt meaning of the words, both the advowſons do paſs.

Mr. Juſtice *Willes*. I am of the ſame opinion.

Mr. Juſtice *Aſhhurſt*. I am of the ſame opinion.

*Per Cur.*

Let the judgment be reverſed.

Upon a writ of error in the Houſe of Lords the judgment of the court of *King's Bench* was affirmed.

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## The Mayor of KINGSTON upon HULL *verſus* HORNER.

*Wednesday, June 8th.*

*A grant or charter from the crown, which ought to be by matter of record, may, under circumſtances, be presumed, though within time of legal memory.*—In this caſe the preſumption was founded on a poſſeſſion of 350 years and adjudged by the court a ſufficient ground.

UPON a rule to ſhew cauſe why a new trial ſhould not be granted upon the ground of a miſdirection to the jury, the caſe appeared, upon the report of Mr. Juſtice *Gould* who tried the cauſe, to be as follows. The declaration conſiſted of ſix counts, ſtating, that the plaintiffs on the 5th of *June* 1772, and *long before* and *ever ſince*, had received, and were lawfully entitled, and ſtill of right ought to receive, amongſt other tolls and duties, a *reaſonable toll* or *duty* called *water-bailiffs dues* for certain goods, ſpecified in the particular counts, imported into the port of *Kingſton upon Hull*; that the defendants having imported, *&c.* and being liable, *&c.* promiſed, *&c.* Upon the general iſſue pleaded, the plaintiffs at the trial produced 1ſt. an entry from their corporation books intitled as follows; "A particular note of "all ſuch duties, *&c.* as by the water-bailiffs are to be received, for "the uſe of the mayor and burgeſſes of *Kingſton upon Hull*; accor- "ding to the order preſcribed and ſet down in the year 1441, "*John Bedford* then being mayor; and continued and put in uſe "from that time to this preſent day 1ſt *April* 1575." In this liſt were included the duties in queſtion. 2dly, An order of the corporation of the 13 *Eliz.* requiring the water-bailiff, every eight or fourteen days to give an account of all monies received by him for the uſe of the town, to the chamberlain; with a direction to the latter, to keep theſe accounts ſeparate from his other receipts: then followed a particular account of theſe monies ſo received from 1545 to 1646: other entries, from 1648 to 1678, of perſons who had rented the office of water-bailiff; an account of the dues for three years in 1726; and concluded, by the parol teſtimony of ſeveral witneſſes who had paid the duties in queſtion from the year 1734, together with an eſtimate of repairs done by the corporation valued at 15,000 *l.*—On behalf of the defendant *contra*, it was obſerved, that the earlieſt book of the corporation was 16 *Ed.* 3. and the date of their original charter of incorporation 27 *Ed.* 1. a full century ſubſequent to the time of legal memory. That their title, if any, to the duties in queſtion could be ſupported only by preſcription or charter: That the firſt certainly did not exiſt, they being a corporation within time of legal memory: and in reſpect of the ſecond it was clear upon the face of a charter granted *anno* 5 *Ric.* 2. that the king at that time only erected or authorized the corporation to erect the port; but granted no duties. The words of this charter 5 *Ric.* 2. were

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as follows: *Conceſſimus quantum in nobis eſt, &c. quod habeant portum ſubtus eandem villam dudum vocat. Sayercreek jam Hull, in perpetuum annexum villæ, ita quod poſſint ædificare domos kaias et ſtaiethas, ad emendationem, defenſionem et ſalvationem villæ prædictæ.* To this it was anſwered, that an uſage of three hundred years was a ſufficient ground to preſume a grant of the duties in conſideration of repairs, which it was in proof the corporation had conſtantly done from the year 1441 to the time of bringing the action. Mr. Juſtice *Gould* in his direction to the jury ſaid he thought, and therefore left it to them to ſay, Whether the words *portum* DUDUM *vocat. Sayercreek* JAM *Hull* did not imply that the port ſo called was an *exiſting* port *before* and at the time of the charter 5 *Ric.* 2. rather than a *creation* of the port: and alſo, Whether they would not conſider the uſage from the year 1441 to the time of the action brought, a ſufficient ground to preſume a *grant* of the *duties* between the 5 *Ric.* 2. (*anno* 1382) and the year 1441. The jury accordingly found a verdict for the plaintiff.

Mr. *Wallace* and Mr. *Davenport* ſhewed cauſe. There are two queſtions. 1ſt. Whether a grant can be preſumed at all? 2d. Whether under the circumſtances of this caſe a grant ought to be preſumed?—1ſt. Circumſtances within time of memory may be a foundation to preſume a grant. In the caſe of *Powell* v. *Milbanke** a grant from the crown was preſumed; though within time of memory.

In 2 *Show.* 47. *Rex.* v. *Carpenter*, evidence of conſtant payment and an antient table of duties was held ſufficient ground to preſume a grant of water-bailiff dues (as in this caſe) on coals to the city of *London*, though the uſe of them was within the time of legal preſcription.—In *Warren ex dim. Webb* v. *Grenville* 2 *Str.* 1129. an *item* in an attorney's bill to make a tenant to the *præcipe* was held ſufficient evidence of the deed in ſupport of a

* *Coram* Lord *Mansfield*, Sittings after *Michaelmas* term 1772. The plaintiff declared for money had and received. On *non aſſumpſit* pleaded, it appeared in evidence, that the chapel of *Cheſter le Street*, in the county of *Durham*, was in the crown from the diſſolution to the time of *Jac.* 1. who by letters patent under the ſeal of *England*, bearing date the 26th of *July* 1628, granted to Sir *James Ouch erlony* and *Richard Gurnard*, their heirs and aſſigns, All that the deanry, prebend, rectory and vicaridge of the collegiate church of *Cheſter le Street*, in the biſhopric of *Durham*, with the following exception "Exceptis tamen ſemper et extra hanc preſentem "conceſſionem noſtram nobis heredibus et ſucceſſoribus noſtris omnino reſervatis omnibus et ſin-"gulis *advocationibus* donationibus liberis diſpoſitionibus et jur. perſonal. om. et ſingul. eccleſi-"aſticar. vicar. capell et al. beneficior. eccleſiaſticor quorumcunq; præmiſſ. ſuperius per pre-"ſentes præconceſſ. aut alicui inde parti vel parcellæ quoquo modo ſpectant. pertinent. incident. "appenden. vel. incumben."

In 1629, *anno* 5 *Car.* 1. the premiſes came by meſne conveyances to the *Hedworth* family, who afterwards granted to Sir *Ralph Milbanke*—That in 1694 Mr. *Hedworth* preſented Mr. *Conyers* to the curacy of *Cheſter le Street*, and that in 1735 Mr. *Lambe* was preſented by a deſcendant of the *Hedworth* family, and continued in poſſeſſion till 1769, when Sir *Ralph Milbanke* preſented the defendant. Upon theſe facts, one point inſiſted on by the plaintiff was, that the exception in the grant left the title to this curacy in the Crown. But Lord *Mansfield* left it to the jury to ſay, Whether from the two adverſe nominations, and poſſeſſion under them, by the *Hedworth* family, they would not preſume a grant from the crown of the right of preſentation to the curacy. The jury preſumed a grant, and found a verdict accordingly.

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2d. Whether in this caſe, a grant ought to be preſumed? If ancient poſſeſſion is a ſufficient ground, the corporation have unqueſtionably been in poſſeſſion of theſe duties 300 years and upwards; namely, from the year 1441. The water-bailiff's table is of that date, and that alone clearly could not be the origin of the claim. It is further in evidence, that the corporation have conſtantly repaired the port at an immenſe expence, which is a ſtrong ground to preſume a legal title. Therefore, if a grant is preſumable, it ought to be preſumed in this caſe.

3dly. The charter 5 *Rich.* 2. is a grant of an *antient* port then *exiſting* and not the *creation* of a *new* port: The words are *Portum* DUDUM *vocat. Sayercreek* JAM *Hull*; which ſhews that it had before been known by the name of *Sayercreek*, and was not then for the firſt time erected and made a port. If ſo, the grant incidentally carries the duties along with it, and the conſideration of the repairs is a good and valid conſideration.

Mr. *Dunning*, Mr. *Lee*, Mr. *Wilſon*, and *Mr. Norton* in ſupport of the rule.

1ſt. The queſtion is not, Whether in any caſe a grant is not preſumeable; becauſe every preſcription carries in itſelf preſumption of a grant; and in this caſe, if the date of the charter had been antecedent to the time of legal memory, the jury might very rightly have preſumed a grant of the duties. But the queſtion is, Whether an uſage which muſt have had its commencement within time of legal memory, is alone ſufficient to be left to the jury of a grant from the crown, which ought to be by matter of record? The law ſays, that ſuch evidence of an uſage as will ſupport a preſcription, is a ſufficient title; that is, a ſufficient ground to preſume a grant. If any uſage leſs than that were ſufficient, preſcription would be uſeleſs. Therefore it is not competent to the jury to preſume a grant, where the uſage does not refer back to the time of legal preſcription. The caſe in 12 *Co.* 4. *Crimes* verſus *Smith*, is not inconſiſtent with this poſition: and in *Bedle* verſus *Beard and others*, 12 *Co.* 5. there is nothing which confines the grant of the advowſon to a leſs recent date than the grant of the manor. But a ſtrong argument to ſhew the improbability of any ſuch grant having been in this caſe, ariſes from the abundant caution in this corporation to preſerve all their moſt antient deeds and records.

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For there are no leſs than three charters of confirmation in the reigns of *Hen.* 4. *Hen.* 5. and *Hen.* 6. immediately ſucceeding that of *Ric.* 2. beſides many others from *temp. Hen.* 8. to that of *Jac.* 2. all which it was totally unneceſſary to have preſerved; and yet the eſſential original charter is to be preſumed to be loſt in a caſe where the corporation itſelf never had an idea, much leſs any evidence of its having even exiſted. Under theſe circumſtances the non-production of it ought not to be ſupplied.

*Second* Point. The charter 5 *Ric.* 2. was not a grant of a port then exiſting; on the contrary, there was *no* port in the crown at all at that time. If there had been, no doubt but the grant of it would incidentally have carried the duties with it. But the words of this charter are clearly words of qualification; and at furtheſt grant only a liberty to the corporation to erect a port, viz. "*Conceſſimus quantum in nobis eſt quod ipſi et hæredes habeant portum in perpetuum annexum villæ, ita quod poſſint ædificare domos, kaiæ et ſtaiethas,*" &c. If the king had at that time a port and the duties incident, the qualifying clauſe *quantum in nobis eſt* would have no meaning. *Habeant portum* is not the phraſe to expreſs an exiſtent port, nor would the ſubſequent words in that caſe have been neceſſary, but might have been all ſupplied by the ſingle expreſſion, *conceſſimus portum.* Further the ſubſequent words prove it was a thing *in fieri*; for there muſt have been quays and wharfs, if the port was then in being, and it muſt have been *annexed* to the town at that time. It is clearly therefore a grant of ſomething that was to be in future, not of a port actually erected at that time. The non-exiſtence of the port is further apparent from the ſilence of all the charters antecedent to the time of 5 *Ric.* 2. amongſt which are three that grant temporary tolls. 28 *Ed.* 1. 1 *Ed.* 3. 5 *Ed.* 3. But in the charter of *Ric.* 3. and ſubſequent grants, the mention of the port occurs frequently. Therefore on both grounds there ought to be a new trial.

Mr. *Lee*, on the ſame ſide contended, that this claim could not have a legal commencement if the port was a newly created port by charter 5 *Ric.* 2. becauſe the duties in ſuch caſe could not be in the crown but by act of parliament; and cited 2 *Vez.* 621. *Vaugh.* 159. *Shepherd* verſus *Goſnold* and 12 *Co.* 34.

Lord *Mansfield.* The ground upon which an application for a new trial has been made in this caſe is, that there was no evidence of title in the plaintiffs to the port duties claimed by the action which ought to have been left to the conſideration of the jury; and if no title was made out which in point of law it

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fit for them to exerciſe their judgment upon, there ought to be a new trial.

There are two grounds upon which it is contended that there was ſufficient evidence of title in the plaintiff to be left to the jury.

Firſt. That there was an antient port of *Hull* in the king before the 5th of *Ric.* 2. with duties annexed to it, particularly thoſe in queſtion; which duties belonged to the king in right of the port. If ſuch a port and duties did exiſt in the king, it is not diſputed, nor can a doubt be made, but that he might grant them to a ſubject: and that they were granted is contended, from the general words of the charter confirmed by uſage. If this ground can be ſupported, there is an end of the motion for a new trial; becauſe the jury have had that left to them, which ought to have been left to them.

But *Secondly*, if that be not ſo, and if it is clear from the words of the charter 5 *Ric.* 2. that no port exiſted before, but that the *charter* itſelf *erected the port only*, without any duties; then it is contended, that between the 5 *Ric.* 2. and the year 1441, there might be ſome charter from the king, creating and giving theſe duties to the corporation, upon a ground which would ſupport them in point of law; namely, upon the conſideration of repairs, and the general advantage to be derived by the public, from its being properly kept up. This was the only point made at the trial, and the queſtion that ariſes upon it is, Whether upon the evidence, it was properly left to the jury to preſume ſuch grant between 1382 and 1441?

I lay out of the caſe that which might have been a foundation for a new trial; I mean the idea of new light to be got from the entries in the corporation books, becauſe there has been an inſpection, and therefore no ſurpriſe: and as to ſpoliation, the court cannot, upon a bare allegation, after inſpection had, go upon a ſurmiſe of that kind, eſpecially as ſince the trial no application has been made to ſee them.

With regard to the firſt point, that is, the conſtruction of the charter of *Ric.* 2. the caſe ſtands thus: It is proved by ſtrong evidence, that from the year 1441, down to the riſe of this queſtion, which comprehends a period of near 350 years, theſe duties have been exacted and ſubmitted to without ſuit or litigation. It likewiſe appears from a charter of the 13 *Car.* 2. which is above a century ago, that the corporation at that time made an application to the king, apprehending they had a title to theſe duties by virtue of a right immemorial, and the king upon their repreſentation confirms them thus: "Whereas

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"we are credibly informed, that within the ſaid town, &c. there "is an immemorial cuſtom that every merchant or other com- "ing into the water with ſhips and goods, &c. and unlading "the ſame within the port of the ſaid town, has been accuſ- "tomed to pay certain fees, &c. for the ſame, we will that "the ſaid cuſtom ſhall continue, and that the ſaid mayor and "burgeſſes ſhall enjoy the like fees, &c. as of time immemo- "rial for the ſupport of the great burthens and expences of the "ſaid mayor and burgeſſes in and about the reparation, preſer- "vation and defence of the ſaid port." There is a like charter of confirmation, *anno* 4 *Jac.* 2.

But it is ſaid theſe charters relate to port duties of *time immemorial*, and the corporation then built their right to them upon immemorial uſage; which cannot be; becauſe both the corporation itſelf, and the grant of the port by charter 5 *Ric.* 2. are within time of memory. But if at the time of the grant, the duties had exiſted immemorially in the king, the ſource of their claim is a preſcriptive right, and their title a derivative title to that which was in the crown from time immemorial, though they themſelves are a corporation within memory.

Then as to the conſtruction of the charter 5 *Ric.* 2. ſo far from thinking it clear, that the charter meant to *create* the port; if I was to determine that queſtion, I ſhould hold that the port *exiſted before*. The grant is, that they ſhall have "*portum* "*ſubtus eandem villam, dudum vocat. Sayercreek jam Hull.*" In the firſt place then conſider, what is a port? It is the water: the terms are ſynonymous; for the limits of the water make the port. *Secondly*, What is that which is deſcribed as having been *once* called *Sayercreek?* Upon the plain conſtruction of the words, it muſt be the *port* and not the town: for ſo early as the charter 27 *Ed.* 1. the town is deſcribed by the name of *Kingeſton ſuprâ Hull*, meaning the river *Hull*; it is therefore apparent from this charter, that the name of the port had before that time been changed from *Sayercreek* to *Hull*; and if never granted out of the hands of the crown till 5 *Ric.* 2. it clearly muſt have remained in him at that time. He grants that the *port* ſhall be for ever *annexed* to the *town*; which in my opinion ſtrengthens the conſtruction of its being an *ancient* port; by affording an inference, that before that time the corporation had only the benefit of it, whereas in future they were to be the owners and proprietors. But there are ſtill other words that ſupport this conſtruction; namely, that they ſhould have the port "*with-*

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*out the interpoſition of the king's officers or miniſters.*" This was a very material and neceſſary privilege, if the port had exiſted before, and the king's officers had been accuſtomed to collect the duties for the crown. But if it were a new erected port, the grant might have been conſidered as an abſolute excluſive grant. But admitting it to be *doubtful*, whether it was an *ancient* or a *new erected* port, the queſtion is a queſtion of fact; and, therefore, moſt proper to be left to the deciſion of a jury; who upon the evidence which in this caſe was the ſtrongeſt poſſible, namely, enjoyment for 350 years, have found in favour of the claim.

Before I proceed to the next ground, I ſhould obſerve that a queſtion was made, whether the grant could have a legal commencement? that is, ſuppoſing the charter 5 *Ric.* 2. to have *created* the port, and the duties to have been *incidentally* granted in conſideration of the repairs, whether ſuch grant would ſupport the claim? if the caſe turned upon that queſtion only, I ſhould take time to conſider of it, and to look into the caſes cited by Mr. *Lee*. But it ſeems to be taken for granted in the caſe of the *Mayor of Exeter* verſus *Trinlet*, *Trin.* 32 & 33 *Geo.* 2. *C. B.* and afterwards in the caſe of the *Mayor of Yarmouth* verſus *Eaton*, *Trin.* 3 *Geo.* 3. *B. R.* that ports are like markets with which the crown is entruſted, and that the king may grant the duties to a ſubject in conſideration of repairing the port.

The next ground is, the preſumption of a charter between 5 *Rich.* 2. 1382. and the year 1441.

Now with regard to admitting evidence to ſatisfy a jury that a charter did exiſt within time of memory which is not produced by record, my opinion is this; namely, *that all evidence is according to the ſubject-matter to which it is applied.* There is a great difference between *length of time* which operates as a *bar* to a claim, and that which is only uſed *by way of evidence.* A jury is concluded by length of time that operates as a bar: as, where the ſtatute of limitations is pleaded in bar to a debt; though the jury is ſatisfied that the debt is due and unpaid, it is ſtill a bar: So in the caſe of preſcription, if it be time out of mind, a jury is bound to conclude the right from that preſcription, if there could be a legal commencement of the right. But any written evidence ſhewing that there was a time when the preſcription did not exiſt, is an anſwer to a claim founded on preſcription. But length of time uſed merely by way of evidence,

evidence, may be left to the conſideration of the jury to be credited or not, and to draw their inference one way or the other, according to circumſtances. For inſtance, there is no ſtatute of limitations that bars an action upon a bond; but there is a time when a jury may preſume the debt to be diſcharged: as where no intereſt appears to have been paid for ſixteen years. But if a witneſs is produced to prove the contrary, as by ſhewing the party not to have been in circumſtances to pay, or a recent acknowledgment of the debt, the jury muſt ſay the contrary. If a foundation can be laid that a record or a deed exiſted, and was afterwards loſt, it may be ſupplied by the next beſt evidence to be had, or if it cannot be ſhewn that it ever exiſted, yet enjoyment under a title which can only be by record, is ſtrong evidence to be left to a jury that it did once exiſt. I do not know an inſtance in which proof may not be ſupplied. Theſe are general rules, and it would be miſchievous, it it were to be laid down, that there can be no preſumption ſince the time of *Richard* I. to confirm a title by charter. 1794. The Mayor of Hull, verſus Horne.

In Lord *Purbeck*'s caſe, the letters patent which were the only proper evidence of his title could not be found; and there was no proof of the record having been loſt: but he had ſat in parliament, had levied a fine of his honours to King *Charles* the Second, and I think enjoyed it to the time of his death. All the other facts were ſubſequent to the creation, yet the Houſe of Lords were of opinion in favour of the claim, and preſumed that the letters-patent had exiſted. Indeed, before the deciſion, the *bill* of the letters-patent was ſaid to be found at the *Privy Seal* office; but ſtill that was only preſumptive evidence; for the king might have recalled it before it paſſed the great ſeal.

But the caſe of *Bedle* verſus *Beard*, 12 *Co.* 5. determined by Lord Chancellor *Elleſmere* with the aſſiſtance of the judges upon deliberation, is a caſe in point, and of very great authority: and it is not liable to the diſtinction which Mr. *Dunning* endeavoured to make, becauſe there was no poſſibility of its being a grant within memory. The caſe ſtates, that in 31 *Ed.* 1. the king being ſeiſed of the manor of *Kimbolton*, to which the advowſon of *Kimbolton* was appendant, by letters-patent, granted the manor with the appurtenances to *H. de Bohun*, Earl of *Hereford* in tail general. *Humphrey de Bohun* the iſſue in tail in 40 *Ed.* 3. granted the advowſon to the Prior of *Stoneley* and his ſucceſſors, by which it became impropriate. The points were two, Whether

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ther the grant of the manor "*cum pertinentiis*" paſſed the advowſon? and adjudged that it could not: *Secondly*, Whether the grant by tenant in tail was not void? But upon this ſecond point, it was reſolved by Lord *Elleſmere* and the principal judges, that notwithſtanding the advowſon did not paſs by the grant of the king under the words "*cum pertinentiis*," and ſo the iſſue in tail had nothing in it at the time of this grant to the Prior; yet it ſhall now (4 *Jac.* 1.) be intended in reſpect of the ancient and continual poſſeſſion, that there was a lawful grant of the king to the ſaid *Humphrey*, ſo that he might lawfully grant to the ſaid priory. *For all ſhall be preſumed to have been ſolemnly done*, rather than that *ancient* grants ſhould be called in queſtion, which were *neceſſary* to the *perfection* of the thing, though the grant cannot now be ſhewn. And it was further obſerved in that caſe, that ancient poſſeſſion would injure inſtead of ſtrengthening a title, if after a ſucceſſion of ages and the deceaſe of parties, objections ſhould prevail which might have been anſwered in the life-time of the parties, and if well founded, would moſt probably have been ſooner made.

I remember, in general, though I cannot recollect the particulars of it, a caſe in the *Duchy-Court* between the King and Mr. *Brown* of *Snelbrook*. It was before the late *nullum tempus* bill. The evidence in ſupport of the title was, a poſſeſſion and enjoyment of 100 years; and I held that though ſuch poſſeſſion and enjoyment could not conclude as a poſitive bar, becauſe there was no ſtatute of limitation againſt the crown, yet it might operate as evidence againſt the crown of right in the defendant, if the claim could have a legal commencement; though ſuch commencement could not be ſhewn. In queſtions of this kind, poſſeſſion goes a great way: but there is no poſitive rule which ſays, that 150 years poſſeſſion, or any other length of time within memory is a ſufficient ground to preſume a charter. In the caſe of a ſuppoſed bye-law, uſage is allowed to ſupport it, without any proof of the exiſtence of ſuch a bye-law, or of the loſs of it. But the principle is a right one, namely, in favour of rights which parties have long been in the peaceable and quiet poſſeſſion of. I have myſelf taken it to be eſtabliſhed in point of law, that though the record be not produced, nor any proof adduced of its being loſt, yet under circumſtances it may be left to the conſideration of a jury, or of a court of equity, if the caſe comes properly before them, whether there is not a ſufficient ground to preſume a charter? Therefore, in the preſent caſe, taking it for granted

granted that ſuch charter would have given the plaintiff a title, I think it was properly left to the jury, Whether they would preſume ſuch grant? I am of opinion that the direction was proper on both points: but I ground myſelf chiefly upon the firſt; that is, that it was rightly left to the jury to ſay, Whether there was or was not an ancient port before and at the time of the charter 5 *Ric.* 2.? Indeed, I ſhould be loth to ſend the cauſe to a new trial, after an uſage of 350 years, even if the fact were much more doubtful. If, upon ſearch of the corporation-books, any new diſcovery ſhall be made that can throw light upon the ſubject, this verdict will be of no prejudice in a new action. Mr. Juſtice *Aſton*, Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* were of the ſame opinion. *Per Cur.* Let the rule for a new trial be diſcharged.

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## REX *verſus* Inhabitants of HARTFORD.

*Saturday, June* 11th.

ERROR from a judgment of the quarter-ſeſſions upon a preſentment by a juſtice of peace, that from time whereof &c. there was, and yet is, a common highway leading from the town of *Witton* in the county of *Huntingdon*, to the village or town of *Hartford*, in the ſaid county, for all his majeſty's liege ſubjects to paſs and repaſs on foot *over a certain drain* or ditch *between* the ancient *incloſures* within the *pariſh* of *Witton* and the *town* of *Hartford*; but the ſame is broken and in ſuch decay that the ſaid ſubjects cannot paſs, &c. and that the inhabitants of the town of *Hartford* ought to repair, &c.

Mr. *Davenport* for the plaintiff in error objected, that the deſcription of this road is too uncertain; but particularly it is not laid to be *in* the pariſh of *Hartford* or in any *other* pariſh, but *over* a ditch *between* incloſures within the pariſh of *Witton* and the town of *Hartford*.

Lord *Mansfield*. It muſt be alleged to lie in the pariſh, otherwiſe the pariſh is not bound to repair, and, therefore, this preſentment is clearly bad. *Per Cur.*

Let the judgment be reverſed.

*Monday, June 13th.*

## BAYLIS *verſus* LUCAS.

Judgment upon a writ of inquiry ſet aſide, becauſe the jury were returned by the attorney for the plaintiff.

UPON a rule to ſhew cauſe why the writ of inquiry executed in this caſe ſhould not be ſet aſide, exception was taken that the jury were returned by the attorney for the plaintiff.

Mr. Juſtice *Aſton*.—The rule muſt be made abſolute. Upon a motion for a new trial in a cauſe from the *Oxford* circuit in the year 1756, it was objected, that *Penoyer Watkins* who was under-ſheriff was attorney for the plaintiff, and that three of the jury were his own relations. The court ſaid, that every trial ought to be fair and indifferent: and, therefore, ordered the rule for a new trial to be made abſolute.

Mr. Juſtice *Aſhhurſt*. If the under-ſheriff is attorney in the cauſe and returns the jury, no doubt it is a good cauſe of challenge. *Per. Cur.*

Let the rule be made abſolute.

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*Same day.*

## FLOYER *verſus* EDWARDS.

One *ſells* goods at three months credit; but ſtipulates, in caſe the money is unpaid, that the vendee ſhall allow him a *half-penny* an ounce *per* month, till the debt is diſcharged. This allowance was according to an uſage in that particular branch of trade, but above the legal rate of intereſt. The contract being a *bonâ fide* SALE is *not* USURIOUS. Otherwiſe, if it had been merely *colourable*, to cover a LOAN and *evade* the ſtatute.

UPON a rule to ſhew cauſe why there ſhould not be a new trial in this caſe. Lord *Mansfield* read his report as follows:—This was an action brought againſt the defendant for goods ſold and delivered at three months credit, with an agreement, at the time of the ſale, that in caſe the money was not paid at the end of three months, then the defendant ſhould pay to the plaintiff an half-penny an ounce *per* month for ſo long a time as the money ſhould remain unpaid. At the trial it was proved that this allowance of an halfpenny an ounce *per* month as before ſtated, was the general uſage and practice of the trade, with one or two exceptions only; but upon calculation it appeared to exceed the legal rate of intereſt. Upon this, an objection was made to the plaintiff's right to recover, upon the ground of its being an uſurious contract, and meant only as a colour to avoid the ſtatute. But, his Lordſhip ſaid, I thought there ſeemed to be weight in the uſage of the trade, and in the circumſtance of it's being in the defendant's power to have avoided

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the additional payment of an halfpenny an ounce *per* month by discharging the principal ſum at the time it became due: and the jury accordingly found for the plaintiff, as I wiſhed, that the contract was not uſurious. 1774. FLOYER verſus EDWARDS.

Mr. *Dunning* moved for this rule upon two grounds. *Firſt*, That though a loan is neceſſary to conſtitute an uſurious contract, yet in a tranſaction like the preſent, the inſtant the limited credit is expired, from that moment, if the money remains unpaid, the condition of the parties is changed; for the buyer becomes a *borrower* and the ſeller a *lender*. *Secondly*, That it is not neceſſary to the creation of a loan, that money ſhould be paid on the one hand, and received on the other; for the circumſtance of a man's money remaining in another's hands, in conſequence of an agreement made for that purpoſe, will equally conſtitute a loan. That no tradeſman can recover intereſt upon non-payment at the day appointed, unleſs there be a ſpecial agreement for the purpoſe; and notwithſtanding ſuch ſpecial agreement, if it be uſurious, as in the preſent caſe, it is as no agreement at all.

Lord *Mansfield* upon the motion ſaid, he thought the ſecond ground was the beſt to reſt the queſtion upon: for it either was, or was not, a contract within the miſchief provided againſt by the ſtatute. If the former, it was clearly an agreement for uſury at the time of the ſale; and therefore, like all other agreements whereupon or whereby more than legal intereſt is reſerved, void: and the plaintiff of courſe not entitled to recover. But where a party takes more than legal intereſt, without any agreement at the time of the contract, there he is liable only to the penalty for the exceſs, and the contract remains good.

Mr. *Wallace* and Mr. *Bearcroft* ſhewed cauſe. This is no loan of money, but a communication for a *bonâ fide* ſale of goods; and the circumſtance of its being in the option of the party to pay the money without an increaſe of the price, removes every idea of its being uſurious: for to make a contract uſurious there muſt be a forbearance reſerved in the contract itſelf, and ſo are the very words of the ſtatute 12 *Ann. ſt.* 2. *c.* 16. "no one "ſhall take directly or indirectly for loan of money, *&c*, above "five pounds for the forbearance of 100 *l. per annum.*" *Burton's* caſe 5 *Rep.* 69. *Mich.* 33 & 34 *Eliz. Roberts* verſus *Tremaine*, *Cro. Jac.* 509. *Hawk. P. C.* 245. *ſect.* 3. 248. *ſect.* 19.

Mr. *Dunning* and Mr. *Buller contra*. The queſtion is, whether it is lawful for a tradeſman ſelling goods, to ſtipulate that

1774. if the price is not paid at a certain time, a greater ſum than legal intereſt ſhall be paid for the forbearance of it: and it is a queſtion of infinite magnitude in reſpect of trade in general.

For the uſe of the law of this. This is not like the caſes cited, where a groſs ſum is ſtipulated *nomine pœnæ*: but it is the caſe of accumulating intereſt, incurring proportionably with the delay. In all thoſe caſes the lender may demand his money as ſoon as it is become due. But it is a fact and an ingredient of this bargain, that both parties looked to a day beyond the day of payment. For the plaintiff was not likely to call for his money when he could make 8 *per cent.* and the defendant upon ſuch an agreement was not likely to have money to pay at the day of ſtrict payment: therefore it is no anſwer to ſay, that he might have paid at the day: for the probability, not to ſay the poſſibility, of the caſe, was againſt his being able to do ſo: and the wiſdom of the laws againſt uſury conſiſts in the protection they ſhew to indigent men. As to the ſuppoſed cuſtom of the trade, the evidence is not ſufficient to create a cuſtom, for the traders are in number but five, and their practice not uniform; but if ſuch uſage did obtain in the trade, it is nevertheleſs void by the ſtatute, if uſurious in itſelf.

*Lord Mansfield.* The ſtatute 12 Queen *Ann. ſtat.* 2. *c.* 16. prohibits any body from taking any how on the loan of money above 5 *per cent* for the forbearance of payment; and all contracts for any loan of money, goods, merchandize, &c. bearing intereſt above 5 *per cent.* with an agreement for principal and intereſt, are null and void; but with regard to principal and intereſt, in caſe the agreement originally for the payment of principal be legal, and the intereſt does not exceed the legal rate; but afterwards upon payment being forborn, illegal intereſt is demanded, there the agreement by retroſpect is not void, but the parties are liable to the penalty of treble value.

This is a caſe on the original contract, by which the payment of the principal is ſtipulated; and therefore, if it is within the ſtatute of uſury at all, the contract itſelf is void. It depends principally upon the contract being a *loan:* and the ſtatute uſes the words "directly or indirectly."—Therefore in all queſtions in whatever reſpect repugnant to the ſtatute, we muſt get at the nature and ſubſtance of the tranſaction: the view of the parties muſt be aſcertained, to ſatisfy the court that there is a loan and borrowing; and that the ſubſtance was to borrow on the one part and to lend on the other: and where the real truth is a loan of money, the wit of man cannot find a ſhift to take it

out of the ſtatute. If the ſubſtance is a loan of money, nothing will protect the taking more than 5 *per cent.*; and though the ſtatute mentions only "for loan of moneys, wares, merchan-"dizes, or other commodities;" yet any other contrivance, if the ſubſtance of it be a loan, comes under the word "indirectly." 1774. Fleetwood, under Executor

Let us examine then what the preſent contract is. It is ſaid the plaintiff is a lender: let us ſee where there is the colour of a loan in this caſe. The plaintiff is a refiner, and deals in gold and ſilver wire; ſo is the defendant: and, in the ordinary courſe of dealing, the one buys and the other ſells a quantity of this commodity on the terms and conditions before ſtated. There is no pretence of any negotiation for a *loan*, nor that one word paſſed about *borrowing* money; nor any evidence of an agreement to forbear paying the principal ſum, contrary to the true intent and meaning of the ſtatute. What are the terms of the contract? are they any newfangled terms? ſo far otherwiſe, that the agreement barely cannot be called an univerſal practice; yet it is the general practice of the trade. It is true the uſe of this practice will avail nothing, if meant as an evaſion of the ſtatute; for uſage certainly will not protect uſury. But it goes a great way to explain a tranſaction; and in this caſe is ſtrong evidence to ſhew that there was no intention to cover a loan of money. Upon a nice calculation it will be found that the practice of the Bank in diſcounting bills exceeds the rate of 5 *per cent*; for they take intereſt upon the whole ſum for the whole time the bills run, but pay only part of the money, *viz.* by deducting the intereſt firſt; yet this is not uſury. Here it appears that the whole agreement was made out firſt, the price of the goods fixed, and a limited credit given; but the party conſiders further, that perhaps punctual payment might not be made; and provides that in that caſe the buyer ſhall pay him ſo much more. This is no agreement for forbearance beyond the three months; the plaintiff might have brought his action inſtantly; and therefore, if not paid, was at liberty to ſay, that the buyer ſhould pay him a greater price. The authorities go ſtill further; and ſay, that wherever it is in the power of a known *borrower* of money to pay the principal within a limited time without intereſt; upon non-payment, the reſervation of a larger ſum than the ſtatute allows, is no uſury: becauſe uſury is an agreement originally to pay the principal with intereſt above the rate of 5 *per cent. Hawk. P. C. c.* 82. *ſect.* 19. I ſee no manner of difficulty to ariſe

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from it. I lay the foundation of the whole upon a man's going to borrow under colour of buying: there the contract is uſurious; but where it is a *bonâ fide* ſale, as in this caſe, it certainly is not. I have never had the leaſt doubt, either at the trial or ſince; and am of opinion as I was at that time, that the jury did right in finding that the contract was not uſurious. The three other judges concurred. *Per Cur.*

Let the rule for a new trial be diſcharged.

*N. B.* After the determination of this caſe, Alderman *Plumbe*, who was head of the Goldſmiths' Company, brought an action againſt *Carter*, one of the gold refiners, *for money had and received*, to recover the ſurplus ariſing from this allowance of an half-penny an ounce *per* month above the principal and legal intereſt. The action was tried at the Sittings in *London* after *Trinity* term 1775, before Lord *Mansfield*. The defendant had paid into court, the principal and intereſt at 5 *per cent.* and offered to pay coſts to the time of the action brought. Therefore the ſingle queſtion was, Whether the plaintiff could recover this ſurplus? Lord *Mansfield* was clearly of opinion that though the tranſaction itſelf did not amount to uſury, yet it was taking a hard and unconſcionable advantage; and therefore ſhould not be aſſiſted in an action for money had and received, which is an equitable action, and founded in conſcience under the particular circumſtances of each caſe. The jury found their verdict accordingly, and the plaintiff acquieſced without moving for a new trial.

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*Same day.*

## MELSOME *verſus* GARDNER.

One who is in cuſtody at the ſuit of the plaintiff in the *Marſhalſea Court*, cannot be removed by *habeas corpus ad reſpondendum* to anſwer to the plaintiff for the *ſame* debt in a new action in *B. R.*

THE queſtion in this caſe was, whether the plaintiff, who had arreſted the defendant in the *Marſhalſea* Court, and had him in cuſtody there, could, by a writ of *habeas corpus ad reſpondendum*, remove the body of the defendant into this court to anſwer to a new action here for the ſame debt. Mr. *Cowper* had moved to quaſh the writ. Mr. *Dunning* now ſhewed cauſe; and cited 2 *Lilly Prac. Regiſter*, *fol.* 2. "none "ought to take out a *habeas corpus* for a priſoner, without his "conſent, unleſs it be to turn him over to the *King's Bench*, "or to charge him with an action in court." *Vin. abr. tit. Habeas corpus*, *fol.* 210. "Where a perſon is in cuſtody in an "inferior juriſdiction, the plaintiff may bring his *habeas corpus* "returnable in this court; and then the defendant cannot "nonſuit the plaintiff, or be bailed but only by the court of "*R. B.*"

Mr.

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Mr. *Cowper contra.* A *habeas corpus* does not lie in this caſe. If it did, the original writs and bills of *Middleſex* in this court would be of little uſe. This is not the proper writ to remove a cauſe; but a *certiorari*: Suppoſe the defendant does not put in bail, the plaintiff can only have a *procedendo* to remove his own cauſe back again. The authorities cited do not apply: they only ſhew, that the plaintiff may have that kind of writ; but not to remove that particular ſuit.

Lord *Mansfield.* There does not appear to be any inſtance of it, and there ſeem to me to be ſtrong reaſons againſt it.

It was referred to the maſter to inquire into the practice of this and other courts.

*Saturday, Nov. 26.*

Afterwards, in *Michaelmas* term, the maſter reported, that there was no inſtance of it in *this* court: That in the court of *Common Pleas* ſome few ſuch writs had iſſued; but he underſtood from Mr. *Fothergill* the oldeſt ſecondary there, they had not been litigated; and ought not, in his opinion, to have iſſued. That in *London*, it is the practice for the plaintiff to be at liberty to remove the cauſe to the mayor's court, from the ſheriff's court; but that the *cuſtody* was *not changed*; the *plaint* only being removed by the *levatur*. He added, that the defendant might in the court below, by a ſummons, oblige the plaintiff below to proceed, or be non-proſſed with coſts; but if he was removed into the cuſtody of the marſhal he would have no method to compel the plaintiff to proceed here, or to obtain his coſts below. Whereupon the court ordered the rule for quaſhing the writ to be made abſolute.

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## HARMAN and others aſſignees of FORDYCE *verſus* FISHAR.

*Tueſday, June 14th.*

THIS was an action of *trover*, brought by the aſſignees of *Fordyce* againſt the defendant, to recover two promiſſory notes. At the trial a verdict was found for the plaintiffs, ſubject to the opinion of the court upon the following caſe.

A trader, in *contemplation* of *abſconding*, incloſes certain bills to *F.* a particular creditor, in diſcharge of his debt; ſaying, he has the honour to

That the defendant *Fiſhar* was a creditor of the partnerſhip of *Fordyce* and *Co.* and on various occaſions had done them many acts of friendſhip: and being already a creditor for 1,300 *l.*

ſhew him that preference which he conceives is his due. This is done without the privity of *F.* and followed by an act of bankruptcy before the notes could poſſibly be delivered. *Per. Cur.* The *eſſential motive* being to give a PREFERENCE and the *act* itſelf *incomplete*, is clearly *void*, though in favour of a very meritorious creditor.

1774. upon the 6th of *June* 1772, paid into the ſhop of *Fordyce* and *Co.* as bankers, the further ſum of 7000 *l.* and had it written in his book according to the uſual courſe; which ſum he had borrowed for the purpoſe of accommodating the ſhop during the holidays; and at the time the money was paid in, he ordered the perſon who paid it to tell them he ſhould not draw the money out before the *Friday* following, which they were told accordingly.

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On the 9th of *June*, *Fordyce* ſet up all night ſettling his books and affairs in *contemplation* of *abſconding*; and being poſſeſſed in his own ſeparate right of the two notes deſcribed in the declaration, about five o'clock in the morning he incloſed them in a letter to Mr. *Fiſhar* as follows: to Mr. *Fiſhar*.— "Mr. *Fordyce* conceiving that the money lodged by Mr. *Fiſhar* "with his houſe on *Saturday* laſt, was a ſum, about which "perhaps even ſome pains have been taken to place it there, "he has the honour *to ſhew him that preference* which he con- "ceives is certainly his due."

5,500 *l.* *Collins* and *Co.* 3d *July*.
11,702 *l.* 18*s.* 4*d.* *T. Wm. Jolly*, 20th *June*.

That *Fordyce* delivered the letter and notes to Mr. *Harriſon* his clerk, with directions to carry them to Mr. *Fiſhar*'s office, and give them to him.—About ſix o'clock the ſame morning *Fordyce* abſconded and went to *France*.—At half an hour after eleven o'clock the ſame morning, a commiſſion of bankruptcy duly iſſued againſt him.—*Harriſon* about ten o'clock the ſame day called at the defendant's office: not finding him at home he returned again about twelve: but it being holiday time the office was ſhut up.—That, on *Thurſday* the 11th, *Harriſon* delivered the letter with the notes to Mr. *James* one of the partners of *Fordyce*, who ſent for the defendant; when Mr. *James*, in the preſence of the defendant and Mr. *Bellamy*, opened the ſaid letter and delivered it with the notes to the defendant; who having read the ſame to the company preſent, took them away with him: that they remain in his poſſeſſion, and that he refuſed to deliver them up. That *Fordyce* was indebted to the partnerſhip in a larger ſum than the amount of the notes in queſtion.

The queſtion for the opinion of the court upon this ſtate of the caſe was; "Whether the plaintiffs are entitled to recover "in this action?"

This

This caſe was twice argued: firſt, in *Eaſter* term * by Mr. *Buller* for the plaintiffs and Mr. *Alleyne* for the defendant; and now in this term by Mr. *Lee* for the plaintiffs, and Mr. *Dunning* for the defendant. 1774. HANMAR verſus FISHAR.

* *April* 29th.

On the part of the plaintiffs it was inſiſted, that under the circumſtances of this caſe it was not competent to Mr. *Fordyce* to give this *preference* to the defendant. For, however, fair the tranſaction might be as between the parties; yet a trader, in contemplation of an act of bankruptcy, cannot give a preference to any particular perſon: becauſe, it is a fraud upon the reſt of the creditors, and againſt the general ſpirit of the bankrupt laws. This principle is fully ſettled and eſtabliſhed in the caſe of *Worſeley* v. *Demattos*, 1 *Bur.* 474. *et ſeq.* where the court held, that an aſſignment of all the bankrupt's effects, tho' a fair tranſaction between the parties, and for a good and valuable conſideration, was nevertheleſs fraudulent in reſpect of the other creditors: the object aimed at, being to give a preference which was unlawful.

The caſe of *Small* v. *Oudley*, cited in the caſe juſt mentioned, may be thought to be an authority the other way: but there no fraud was meant againſt the creditors: on the contrary, the court ſaid the whole tranſaction was beneficial to them; and the only perſon defrauded was *Small*. Beſides, the only point decided in that caſe was, that a deed cannot be fraudulent in equity which would not amount to an act of bankruptcy at law.

But the preſent caſe is clearly diſtinguiſhable from *Small* v. *Oudley*: For here the defendant knew the ſhop to be in a deſponding ſtate when he advanced the money: the repayment was voluntary, without the knowledge of the defendant, in the very moment of abſolute bankruptcy, and with a profeſſed view of giving an undue preference. An additional circumſtance is, that the notes were not delivered till after a clear act of bankruptcy was actually committed: For want, therefore, of the defendant's *aſſent*, the tranſaction was not complete, which alone is ſufficient to render the payment void. There are two caſes in which this objection made a principal ground in the determination the court gave. *Hague* v. *Rolleſton*, *Hil.* 8 *Geo.* 3. (ſince reported in 4 *Bur.* 2174) and *Alderſon* v. *Temple*, ſince reported likewiſe 4 *Bur.* 2238 *Paſch.* 8 *Geo.* 3. But the reaſoning and principles laid down in the latter caſe upon the queſtion of

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preference are decisive of the present. Mr. *Buller* stated the opinion of the court at large, *quod vide*. 4 *Bur*. 2239.

This doctrine is confirmed and strengthened by a case of very late date. *Linton* v. *Bartlett*, *Hil.* 10 *Geo.* 3. *C. B.* MSS.

The case was thus: The plaintiff's brother carried on his trade in two separate shops, an upper and an under one: being indebted to his brother, upon the 3d of *August* he assigned over to him such of his goods as were in his upper shop, being one third part only of his stock in trade: and this he did for the purpose of giving his brother a preference: the question was, Whether this assignment was an act of bankruptcy? *Per curiam*, "This is a very plain case: the deed and the transaction may "have been very fair as between the parties; but in all these "cases the object to be attended to is, *quo animo* the transac- "tion is done. Now the single question is, Whether a man "shall be allowed to commit a fraud upon the whole system of "the laws concerning bankrupts, by giving a preference to one "creditor in prejudice to the rest? clearly he shall not: and "here it being by deed, it is in itself an act of bankruptcy. "The great criterion is, Whether the act be done in contempla- "tion of becoming a bankrupt."

This is a decision expressly upon the point of preference in contemplation of bankruptcy; and no inconvenience can arise from fixing that as the moment when the curtain should drop. Here it is expressly found that the notes were sent in contemplation of committing an act of bankruptcy, and professedly with a view to give the defendant a preference. The act, therefore, is void, and the plaintiffs well entitled to recover.

Mr. *Dunning* and Mr. *Alleyne* for the defendant.

Two questions arise in this case, *First*, Whether it is competent in law for a trader, in contemplation of an act of bankruptcy, to give a preference under any circumstances?

*Secondly*, If there be any case in which that preference may be given, Whether this is one of those cases?

With respect to the first, It has been settled that a trader at the eve of a bankruptcy may do every thing that he might have done at any period antecedent to that time: but it has never been established that a trader shall at *no* time give a preference to a *bona fide* creditor. On the contrary, the case of *Small* v. *Oudley* 2 *P. Wms.* 427. is an authority expressly the other way. The circumstances were very like the present. On the 21st of *September* 1720, *Small* to accomodate his friends *D.* and *J. Nor-*

*court*,

*court* transferred 500 *l. South-sea* stock to them upon condition it should be returned in ten days. Upon the 29th they made an assignment of *part* of their effects to *Small* as a security for transferring 500 *l. South-sea* stock, reciting the truth of the case and the next day absconded.—Sir *Joseph Jekyl* was clearly of opinion that this assignment was good: "that there may be a just reason for a sinking trader to give a preference to one creditor "before another; to one that has been a faithful friend, and for "a just debt lent to him in extremity; when the rest of his "debts might be due from him as a dealer in trade, wherein "his creditors may have been gainers: whereas the other may "not only be a just debt, but all that such creditor has in the "world to subsist upon: in this case, and so circumstanced, the "trader honestly may, nay ought to give a preference." He says further, "the time of the assignment is not material, provided "it be before the bankruptcy: but the justness of the debt is "very material; and the circumstance of the non-privity of "the creditor to the assignment was very much in his favour."

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It is plain, therefore, from this case, that antecedent to an act of bankruptcy actually committed, there may exist a case in which by law it is permitted to a trader to give a preference. The observation made by Lord *Mansfield* upon this case of *Small* v. *Oudley* in the decision of *Worseley* v. *De Mattos* tends to explain that the ground of the opinion was right. For, his Lordship said, "this case was very particular: the fraud was "upon *Small*, and not upon the creditors: His stock was to be "replaced in a week or ten days at furthest: 1,800 *l.* of *Small*'s "money went to the creditors, and this security amounted but "to 300 *l.* So that the whole transaction was beneficial to the "creditors." Now every syllable and every circumstance upon which Sir *Joseph Jekyl* founded his opinion in that case, is not only applicable to, but actually to be found in the present.

The case of *Linton* v. *Bartlett* is inapplicable to this case: for the ground of that decision was that the assignment was an act of bankruptcy itself, and, being of *all* the goods in *that* shop, was within the same mischief as if it had been an assignment of the goods in *both*. It has been insisted that no inconvenience can arise if the line were to be drawn at the beginning of an insolvency. That is not so; for then all the creditors subsequent to the time when the court determines that the line of distribution should be drawn, must be involved in the wreck. The contemplation of becoming bankrupt, is equally difficult to ascertain:

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certain: but neither the point of inſolvency nor the reſolution to become bankrupt is the period of bankruptcy; nor can the contemplation of bankruptcy be the true line to be drawn: for each is ſo indefinite and uncertain, that the rule in either caſe would tend to endleſs litigation. It were to be wiſhed, therefore, that the court would ſettle the rule of preference according to the honeſty or diſhoneſty of the tranſaction.

In *Alderſon* v. *Temple*, Mr. Juſtice *Yates* ſaid, there is no doubt but that an act of this ſort may be done on the eve of a bankruptcy under fair and honeſt circumſtances; and that in *Small* v. *Oudley* the juſtice of the caſe required it. With reſpect to the act being incomplete for want of the defendant's aſſent, in *Atkins* v. *Barwick*, 1 *Str.* 165. the aſſent was ſubſequent to the act of bankruptcy: and the only queſtion was, Whether a ſubſequent diſſent was neceſſary to deveſt the property.—The court held, that delivery veſts property unleſs deveſted by a ſubſequent diſſent: and if founded upon good conſideration is not countermandable. Here the delivery was unqueſtionably upon good conſideration; and, therefore, as to the point of non-privity and aſſent, the authority is deciſive.

The ſecond queſtion is, Whether this is a caſe in which a preference may be given? And this, we have ſeen, depends upon the honeſty of the tranſaction.

Now, the purpoſe for which Mr. *Fiſhar* advanced this money was meritorious and friendly in the higheſt degree: the uſe to which Mr. *Fordyce* applied it, namely, to leſſen the partnerſhip debt, was juſt and honeſt: but his diſtreſſes were ſuch as defeated the object, and, therefore, what could be more fair, what more reaſonable, what more diſtant from fraud than to return it. When returned, the creditors were preciſely in the ſame ſituation as they would have been in, if it had never been advanced: and no doubt in itſelf the loan of the money was as friendly and in its conſequences might have been as beneficial to them as it was intended to be to Mr. *Fordyce*.

Lord MANSFIELD, after ſtating the caſe delivered his opinion as follows:

The defendant Mr. *Fiſhar* is certainly a very meritorious creditor of Mr. *Fordyce*; and in this laſt tranſaction did him a very great act of friendſhip. I have, therefore, been very ſorry, as far as one can be ſaid to be ſorry in the adminiſtration of juſtice, that I could not ſee in this caſe any circumſtances which could give riſe to a queſtion: for they are ſo very particular as not to lay the leaſt foundation for one.

The

The queſtion is, "Whether the plaintiffs are entitled to recover in this action?" which depends on this: Whether the property of the two notes was duly and regularly transferred before the act of bankruptcy? I ſay duly and regularly, becauſe that excludes fraud.

*Legal preference* is where the property is *duly* and *regularly* transferred;

There has been much argument upon a general queſtion, "Whether a trader in contemplation of an act of bankruptcy "can give a preference to a *bonâ fide* creditor?" Perhaps the ſtating it as a general queſtion involves a great impropriety: becauſe no trader can do an act of fraud, contrary to the ſpirit of the bankrupt laws, and to the injury of his creditors. He cannot aſſign his effects to all his *other* creditors in excluſion of one whom he thinks diſhoneſt or unjuſt: nor even to be equally divided amongſt all his creditors; becauſe he cannot take his eſtate out of that management which the law puts it into. If any act of this ſort is done by deed, it is not only void, but in itſelf an act of bankruptcy from the date of the deed. If without deed, it is void in reſpect of thoſe whom it prejudices.

But all queſtions of preference turn upon the action being complete before an act of bankruptcy committed: for then the property is transferred: otherwiſe, an act of bankruptcy intervening veſts the property in the hands and diſpoſal of the law.

and the *transfer* itſelf *complete before* an act of *bankruptcy*.

In the caſe of *Worſeley* v. *De Mattos*, whatever the court might think of the caſe of *Small* v. *Oudley*, there was no intention to lay it down that the determination of that caſe was wrong at that time. But no caſe ever came before us where we were warranted to ſay, that no caſe can exiſt of a legal preference. For if a man were to make a payment but the evening before he becomes bankrupt, independent of the act of parliament and in a courſe of dealing and trade, it would be good: or ſuppoſe legal diligence uſed by a creditor, and an execution or *ca. ſa.* is in the houſe, and under terror of that he makes an aſſignment and delivery of his effects, it would be valid; the object not being to give a preference, but to deliver himſelf.—In *Cock* v. *Goodfellow* the act done was fair: it was done ſeveral months previous to the act of bankruptcy, and was no more than what the court of Chancery would have compelled the party to do. Where an act is done that is right to be done, and the ſingle motive is not to give an unjuſt preference, the creditor will have a preference.

As where a payment is made by a trader, in the *ordinary courſe of dealing*, or *enforced by* legal *proceſs*, though but the evening before he becomes bankrupt.

In *Small* v. *Oudley* upon a *Stipulation* to replace ſo much ſtock the *day* agreed upon was *paſt*; the eſtate had had the benefit of the

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the solemn agreement, and the bankrupts gave a security for part of the debt only: a distinction was likewise taken because the security was upon their effects in a separate trade. That was a very favourable case: but I think it extremely shaken by the case of *Linton* v. *Bartlett* in the *Common Pleas*, which goes further than any other: For that case has determined that though the act be complete, yet if the more and sole motive of the trader was to give a preference, it shall be void; and if by deed, is in itself an act of bankruptcy. In that case the money was advanced by the brother from motives of friendship and without interest. Possession of the goods was delivered instantly upon the assignment being made; and a clear act of ownership exercised by the brother, by his exposing them to sale, and carrying on the trade: nor had he the least knowledge or suspicion of the insolvency. But the material circumstances which made that a fraudulent act, are these: The brother did not arrest, or threaten, or even call upon the bankrupt for the money: But the bankrupt of his own *voluntary* act gave him the assignment. With what intent? Why, to give him a preference. The goods assigned were not more than one-third of his effects. Upon what then was the opinion of the court founded? Not upon one-third being the same as an assignment of all his effects; but upon the trader's giving a preference; and upon his sole motive being to do so. If he can give it to one, he can give it to another; which would establish this principle, that a bankrupt may apportion his estate amongst his different creditors as he thinks proper. That case goes further than any former decision. It had before been held in *Worsley* v. *De Mattos* that an assignment of *all* was a clear act of bankruptcy, and an exception of *part*, if colourable or fraudulent, will not take it out of the general rule.

But the present case affords no circumstances that can give rise to a question. A trader at five o'clock in the morning, just going to commit an act of bankruptcy, orders his servant to take certain bills to a creditor in discharge of a debt: pursuant to no *contract*: in performance of no obligation; in no course of dealing; without the privity of the creditor, or call on his part for the money, and without a possibility of the notes being delivered before an act of bankruptcy was committed. This is an order how his effects shall be apportioned after his bankruptcy. He delivers the letter to his own servant, and might have countermanded it: here it falls in with the case of *Temple* v. *Alder-*

*son*,

*ſon*, and *Hague* v. *Rolleſton*: The act was not complete; and therefore the act of bankruptcy revoked it. Suppoſe the drawers had been inſolvent, was Mr. *Fiſher* bound to take the notes in ſatisfaction of his debt? Beſides, the amount of the notes exceeded the debt by ſeveral hundred pounds. But what is the nature of the tranſaction upon the face of the letter? It is in terms a declaration that he means to give a *preference*. This the law does not allow: and if it had been by deed it would itſelf have been an act of bankruptcy. But it is much ſtronger where the trader mentions that to be his *ſole* motive; and where the act cannot be completed till after an act of bankruptcy actually committed. 1774. HARMAN *verſus* FISHER.

The three other judges were of the ſame opinion.

Lord *Mansfield* added, that if a preference were only conſequential, the caſe might be different: as if a payment were made or an act done in purſuance of a prior agreement. His Lordſhip further obſerved that with reſpect to the caſe of *Atlyns* v. *Barwick*, 1 *Strange* 165. the judgment ſeemed to be right, but the reaſons wrong. The true ground was, that the trader very honeſtly *refuſed* to *accept* the goods, and *returned* them.

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## HUGHES *verſus* RICHMAN.

*Same day.*

IN covenant the plaintiff declared as aſſignee of one *Clarke*, for that the defendant, under an indenture of leaſe from the ſaid *Clarke*, had covenanted, *inter alia*, "that he the ſaid *John* "*Richman* would permit and ſuffer the ſaid *Joſiah Clarke*, his "heirs, nominees, and aſſigns, or his or their next tenant or "tenants, to enter into and upon all or any part of the demiſed "premiſes, which in the laſt year of the ſaid demiſe ſhould be "ſown with barley or oats, and then and there to ſow along with "the barley and oats of the ſaid *John*, ſo much clover and "graſs ſeeds in ſuch manner as the ſaid *Clarke*, his heirs, &c. "ſhould think fit." The breach aſſigned was, "that the de-"fendant in the laſt year of the term, did *ſow* twenty acres "with *barley*, and twenty acres with oats, *without giving notice* "to the plaintiff; by which he was prevented from ſowing "the clover and graſs ſeeds." The defendant pleaded, "that "he did not *prevent* the plaintiff from ſowing as much clover "and graſs ſeeds as he thought fit and convenient." The plaintiff demurred, and aſſigned for ſpecial cauſes of demurrer, 1ſt, That defendant

COVENANT "to "permit the "plaintiff in "the laſt "year of the "term to ſow "clover "among de-"fendant's "barley." BREACH ASSIGNED was, that the defendant ſowed, &c. *without giving* the plaintiff *notice*. PLEA, that the defendant did *not prevent*, and upon demurrer adjudged a good plea.

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the defendant by his plea had put in iſſue a matter of *inference* from the fact before alleged. 2dly, That he had offered to put in iſſue a matter not properly iſſuable. 3dly. He had not by his plea denied, confeſſed, or avoided the ſubſtantial matter.

Mr. *Baldwin* for the plaintiff. Covenants depend ſo much upon the nature of the particular contract that there is no caſe in point; but I contend that the defendant ought to have given notice to the plaintiff before he ſowed the land with barley and oats, in order that he might ſow graſs ſeed at the ſame time agreeably to the terms of the covenant: for it is a general rule, that wherever the matter lies more in the conuſance of one party than of another, ſuch party ought to give the other notice. *Hardres* 42. Here the plaintiff could not be appriſed of the intention of the defendant to ſow, or even of the fact of his having ſown barley and oats, without previous notice; and therefore it was incumbent upon him to give ſuch notice.

Mr. *Buller* for the defendant. The plea is good in ſubſtance and in form. For 1ſt. In a declaration in covenant, the breach may be aſſigned as generally as the covenant, even though it amount to a negative pregnant. *Cro. Jac.* 170-304. 3 *Mod.* 69. 2dly. The defendant need not be more particular in his plea, than the plaintiff in his declaration, and he may elect to purſue either the words of the breach aſſigned, or the words of the covenant itſelf. If he anſwer the former, it is ſufficient, becauſe then there can be no cauſe of action; if the latter, it is an anſwer to all the charge alleged. Here the covenant is, "to permit and ſuffer," and the breach aſſigned is, "that the defendant prevented by not giving notice." The plea is, "that he did not prevent the plaintiff from ſowing "the graſs ſeed." The queſtion is, Whether notice is neceſſary? I contend it was not; for it is not a general rule that where things lie more in the knowledge of one party than of the other, that that perſon is bound to give notice. On the contrary, if there had been an expreſs covenant in this caſe, on the part of the plaintiff to ſow clover, *&c.* when the defendant ſowed barley, *&c.* it would have been incumbent on the plaintiff to have taken notice at his peril, when the defendant ſowed barley. If he is not bound, therefore, to give notice, where the omitting to do ſo would create a breach in the plaintiff, much leſs is he obliged where it is to excuſe a breach on his own part. *Cro. Jac.* 102. *Bulſtrode* 254-5. *Jenkins* 337. *Cro. Jac.* 475. 1 *Roll. Abr.* 464.

Again,

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Again, this covenant is merely negative and paſſive; and therefore to conſtitute a breach ſome act muſt be done: a non-feazance only is not ſufficient. 1. *Roll. Abr.* 425. *pl.* 45. 1 *Roll.* 430. *pl.* 16. 3 *Leon.* 38. *Laſtly*, If a breach at all, it is a conſtructive breach: for admitting it to have been in the intention of the parties that notice ſhould be given, yet no notice is expreſſed in terms which it ought to have been. It is therefore *caſus omiſſus* in the covenant, which the court will not ſupply. *Sty.* 12.

Lord *Mansfield*. Stript of the authorities that have been cited, this is a very plain caſe. The covenant makes no mention at all about any notice to be given. The breach aſſigned is, the not permitting the plaintiff to ſow graſs ſeed. The ſingle queſtion is, whether the defendant did or did not prevent him? If he had refuſed to give notice, or had given a wrong notice, it might have been a breach: but here it appears that he has done nothing to prevent him or the contrary. Therefore there can be no breach.

*Willes* Juſtice concurred. *Aſhhurſt* Juſtice—The plaintiff is the party for whoſe benefit the covenant was intended; therefore he ought to have uſed due diligence. *Per Curiam*,

Judgment for the defendant.

## MARDER *verſus* COX.

*Wednesday, June 15th.*

BY an order of *Niſi Prius* referring this caſe to arbitration, it was ordered, "that all matters in difference between "the parties, together with the coſts of this action and refer- "ence, be referred to the award of, &c." The arbitrator as to the coſts awarded as follows: "That the defendant ſhall "pay to the plaintiff his full coſts and charges of this action "ſuch coſts to be taxed as between *attorney* and *client* by the "proper officer, &c."

*Coſts of ſuit on a rule of reference, are common coſts. Vide S. P. determined this ſame term in C. B. in the caſe of Barker v. Timſon. 2. Blackſtone Rep. 953.*

Mr. *Dunning* moved to ſet aſide this award, becauſe the arbitrator had exceeded his power in directing the coſts to be paid as between attorney and client: for the intent of the reference was merely to put the party who ſhould be thought right, in the ſame ſituation as if he had had a verdict; in which caſe he could only have received coſts taxed in the ordinary courſe between party and party.

Upon

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Upon ſhewing cauſe, the court held the award wrong upon this objection; for the words of the reference clearly meant coſts in a technical ſenſe, which are *legal* coſts: but as to *coſts* they held it good; and therefore ordered, * that ſo much of the award as directed the maſter to tax the coſts as between attorney and client, ſhould be ſet aſide, and the reſt ſhould ſtand.

*In *Barker* v. *Timſon* there was the like rule: But the motion in that caſe was only to ſet aſide *ſo much* of the award as directed the coſts to be paid as between attorney and client.

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*Same day.*

## Anonymous.

UPON a rule to ſhew cauſe why the proceedings in this ejectment ſhould not be ſtaid till a ſufficient plaintiff was found, the leſſor of the plaintiff being an infant; Mr. *Morgan* ſhewed for cauſe, that no application had been made to know if there was a real and ſubſtantial plaintiff; and it being ſtated by affidavit that the guardian had undertaken to pay the coſts, if the ſuit ſhould be determined againſt the infant, the court diſcharged the rule with coſts.

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*Thurſday, June 16th.*

## Anonymous.

In an action upon the judgment though for *above* 10*l.* the defendant ſhall not be held to *ſpecial bail*, if the *original* demand was *under* that ſum.

UPON a rule to ſhew cauſe why upon filing common bail a *ſuperſedeas* ſhould not iſſue as to this action to diſcharge the defendant out of gaol; Mr. *Cowper* ſhewed for cauſe that though the debt was originally under 10*l.* yet after judgment obtained, and *coſts* taxed, the whole ſum amounted to 17*l*; and that upon a writ of execution being ſued out, the defendant, in conſideration that the plaintiff would ſtay the execution at that time, undertook and promiſed to pay the debt and coſts. That ſeveral applications had been ſince made to the defendant for payment without effect, and, therefore, he was now held to bail upon his new *aſſumpſit* for the 17*l.*

*Willes* Juſtice mentioned the caſe of *Palmer* v. *Nedham* 3 *Burr.* 1389. where the plaintiff, whoſe original demand was only 3*l.* 13*s.* 6*d.* having obtained judgment, brought an action of debt thereupon for the debt and coſts, amounting in the whole to above 10*l.* and held the defendant to ſpecial bail. But upon ſhewing cauſe why *common* bail ſhould not be accepted, and the bail-piece diſcharged, the court ordered it accordingly.

Lord MANSFIELD. This is a new ſpecies of action, and an attempt to turn a judgment debt into a debt upon ſimple contract. If the undertaking had been by a third perſon in conſequence of the forbearance, it would have been a good ground of *aſſumpſit* againſt ſuch third perſon. But here the promiſe is by the defendant himſelf to pay a debt to which he was before liable upon record: for by the judgment he is liable to the coſts as well as to the debt. And, therefore, I am of opinion that ſuch promiſe is no ground upon which to raiſe an *aſſumpſit*.

*Aſhhurſt* Juſtice. I am of the ſame opinion. This promiſe is no waiver or extinguiſhment of the judgment debt; but it ſtill remains a lien upon the land.

Rule made abſolute.

[illegible] Promiſe by the [illegible] to pay a judgment debt obtained againſt him in conſideration that the plaintiff would ſtay execution thereon, is no ground to raiſe an *aſſumpſit*. Otherwiſe, if the promiſe be by a third perſon.

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## DOE on the demiſe of ROGERS *verſus* MEARS.

*Friday, June 17th*

IN ejectment brought to recover two rectories, upon a caſe reſerved for the opinion of the court, the facts were as follow. "That upon the 9th of *May*, 1766, the rector, in "purſuance of an agreement, and in conſideration of 360 *l.* de- "miſed the rectories in queſtion to the leſſor of the plaintiff "for 99 years, if the rector ſhould ſo long live, for the purpoſe "of ſecuring to the leſſor of the plaintiff an annuity of 60 *l.* "*per annum*, with a power of entry, and likewiſe a power of "diſtreſs and ſequeſtration if the annuity were in arrear. "That the annuity was in arrear, that the rector abſconded in "*December* 1770, and had not been reſident ſince." No witneſs was called on the part of the defendant, but it was admitted that he was in poſſeſſion under a ſequeſtration. A verdict was found for the plaintiff, ſubject to the opinion of the court upon the following queſtion; "Whether the deed and the leaſe "under which the plaintiff made his title was void by the ſtatute "13 *El. c.* 20?"

A ſequeſtration upon a *ſi. fa.* of a benefice with cure, is no excuſe for the non-reſidence of the incumbent; and a leaſe thereof made by him, is, on account of ſuch abſence, void by the ſtat. 13 *Eliz. c.* 20. *ſect.* 2.

Mr. *Whitchurch* for the plaintiff. The object of the ſtat. 13 *Eliz.* c. 20. was to prevent the corrupt transfer of eccleſiaſtical benefices only: and being a penal ſtatute ought to be conſtrued ſtrictly. But here no proof is ſtated of any corrupt agreement, therefore it is not within the penalty of the ſtatute. —2dly, The abſconding in this caſe is not an abſence within the purview of the ſtatute, which clearly meant a *voluntary* and wilful

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non-reſidence, not a compulſory abſence as in this caſe, in conſequence of the defendant's ſequeſtration. The words of the ſtat. 21 *H.* 8. *c.* 13. *ſect.* 26. againſt non-reſidence and the caſes decided upon it ſupport this conſtruction, "every ſpiritual perſon "*&c.* who ſhall *wilfully* abſent himſelf." *Moore* 448. 6 *Rep.* 21. *b.*

Mr. *Murphy* for the plaintiff cited *Bunb.* 210, 211.

Lord MANSFIELD. This is a very clear caſe. A ſequeſtration under a *fieri facias* is no impediment or prevention to the ſerving a cure; and therefore the non-reſidence is a clear avoidance of the leaſe. *Per curiam.* Let a nonſuit be entered and the poſtea be delivered to the defendant.

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*Same day.*

## HEYLYN *verſus* HEYLYN.

One, having made his will, and deviſed *all* his freehold and *copyhold* lands to a *number of uſes*, afterwards purchaſes *other copyhold* lands which he ſurrenders thus: "*To the uſes* "DECLARED *or to* "*be declared* "*in and by* "*his laſt* "*will and* "*teſtament.*" This amounts to a *republication*; and the *newly purchaſed copyhold lands* ſhall paſs to the ſame uſes as the teſtator's copyhold lands deviſed by his will.

THIS was a caſe from Chancery for the opinion of this court, in ſubſtance as follows:

That *John Heylyn* being ſeiſed in fee of certain *freehold* lands called *Hanchet-Hall*, part thereof ſituate in the county of *Eſſex*, and other part thereof in the county of *Cambridge*, and being likewiſe ſeiſed of certain other lands called *Higgons*, partly *freehold* and partly *copyhold* in the county of *Eſſex*, duly made and publiſhed his laſt will bearing date the 13*th of March* 1732, and thereby deviſed ALL his meſſuages, lands, tenements and hereditaments, as well freehold as copyhold, ſituate, lying and being in the counties of *Suffolk*, *Eſſex*, and *Cambridge*, or either of them, to *Suſannah Helen* his wife for life; and after her deceaſe to a number of uſes: and deviſed All the reſt and reſidue of his real and perſonal eſtate to his wife, her heirs, executors and adminiſtrators, and appointed her his ſole executrix.

That the teſtator at the time of making his will was mortgagee out of poſſeſſion of three fifth parts of certain copyhold premiſes holden of the manor of *Heddingham Upland* in the county of *Eſſex*, which he afterwards purchaſed and was admitted to on the 20th of *October* 1735, and in the ſame year purchaſed one other fifth part of the ſame premiſes; all of which he ſurrendered thus: "To the *uſes*, intents and purpoſes, *declared* "or to be declared in and by his laſt will and teſtament."

In the year 1736, the teſtator directed a 50*l.* legacy to be ſtruck out of his will, and ſubſcribed the following memorandum in the preſence of two witneſſes: *September* 31ſt 1736. "The 50*l.* "legacy to the poor of the pariſh of *Wrenham*, ſcratched out as "above, was done in his preſence and by his immediate order, he

" having paid it himſelf." That in the year 1737, the teſtator *John Heylyn* died ſeiſed of the ſaid lands called *Hanchet-Hall* and *Higgons*, and alſo of the four fifth parts of the ſaid copyhold lands holden of the manor of *Heddingham Upland* in the county of *Eſſex*, without revoking or altering his ſaid will, or making any codicil thereto, except the codicil or teſtamentary declaration above-mentioned. 1774. HEYLYN v. HEYLYN

The queſtion ſtated for the opinion of the court was, " Whether the copyhold lands to which the teſtator *John Heylyn* was " admitted the 20th of *October* 1735, and ſurrendered to the " uſe of his will, or any part thereof, were ſubject to any of the " uſes mentioned in his will dated the 13th day of *March* 1732, " and which of them?"

Mr. *Manſfield* for the plaintiff. The copyhold lands did not paſs by this will. 1ſt. Becauſe no after purchaſed lands can paſs by a will already made, however general or extenſive the words of ſuch will may be: 1 *Salk.* 237. *Den* on the demiſe of *Harris* v. *Cutler*, *Tr.* 10 *Geo.* 3. *B. R.* 2dly, They clearly cannot paſs by the expreſſions uſed in this will and ſurrender; becauſe the ſurrender is merely in the common form, to the uſes declared or to be declared, *&c.* But no uſes were declared of theſe lands at the time of their being purchaſed, nor is there any thing in the ſurrender which diſtinguiſhes to which of the uſes in the will they ſhould operate; conſequently they deſcend to the heir at law as being undiſpoſed of.

Mr. *Dunning contra.* The copyhold lands in queſtion did paſs by this will. The terms of this ſurrender are framed ſo as to relate either to a will in being, or to any future will the teſtator might be ſuppoſed to make. But the rule as laid down reſpecting after-purchaſed lands is not univerſally true; for if a man purchaſe freehold or copyhold lands, and by any diſpoſition he may chuſe to make of them recognizes an intention expreſſed in a former inſtrument, ſuch recognition will guide the diſpoſal of them. The caſe of *Harris* v. *Cutler* is in favour of the defendants. For there Lord *Manſfield* ſaid, that a ſurrender of lands after-purchaſed might be ſo penned as to refer to a diſpoſition already made: and the ground of the deciſion was, that the words of ſurrender were to ſuch uſes as *I. S.* ſhall declare, *&c.* Here the ſurrender is ſo penned as to relate to the will of 1732, for it is to the uſes declared, *&c.* But if it were doubtful, the circumſtance of eraſing the legacy of 50*l.* which was ſubſequent to the ſurrender, in itſelf amounts to a republication of the will: for it is ſtrong evidence to ſhew that

1774. [illegible] he meant the reſt of his will ſhould remain good, and the ſlighteſt proof is ſufficient to make a republication, which is always favoured in law. 1 *Vern.* 330. 1 *Bulſt. Abr.* 617.

Lord MANSFIELD. I entertain the leaſt particle of doubt in this caſe: the ſtating the nature of a republication will go a great way in the conſtruction of this ſurrender. When a man republiſhes his will, the effect is, that the terms and words of the will ſhould be conſtrued to ſpeak with regard to the property he is ſeiſed of at the date of the republication, juſt the ſame as if he had had ſuch additional property at the time of making his will. Therefore, if one deviſes lands by the name of *B. C.* and *D.* and purchaſes new lands and republiſhes his will; the republication does not concern ſuch new lands, becauſe the will ſpeaks only of the particular lands *B. C.* and *D.* But if the teſtator in his will ſays, I give *all* my real eſtate, a republication will affect ſuch newly purchaſed lands, becauſe it is then the ſame as if the teſtator had made a new will. Apply this rule to the caſe of a ſurrender, and I am of opinion that the ſurrenderor may expreſs himſelf ſo as to make it relate to a will actually made; and that the copyhold lands ſo ſurrendered will paſs by it. Suppoſe a teſtator ſeiſed of copyhold lands makes his will without a ſurrender; if he afterwards ſurrender them to the uſe of his will, ſuch ſurrender will clearly make his will good, and is effectual to paſs them: becauſe it only obviates the mode and form of conveyance.

What has the teſtator done here? having made his will and declared his lands to uſes, he ſurrenders his newly purchaſed copyhold lands, to the uſes, intents and purpoſes, declared or to be declared in his will; it is preciſely the ſame thing as if he had ſaid, and whereas I have made a will ſo and ſo, and deviſed all my lands to *I. S.* to ſuch and ſuch uſes, I mean theſe newly purchaſed lands ſhould paſs to the ſame uſes. I cannot poſſibly make a doubt as to the conſtruction: and there was no occaſion to ſtrike out the legacy of 50 *l.* unleſs he intended that particular part of his will ſhould be cancelled, and the reſt ſtand.

Lord MANSFIELD added,—I ſhould have obſerved upon the inaccuracy of reporters, who are very apt to ſay that a thing is ſo and ſo in *Equity*. Now there is no republication in equity that is not ſo in law. But the expreſſion *in equity* is very likely to miſlead ſtudents, and make them imagine there is a diſtinction.

The court certified their opinion to the court of Chancery as follows:

Having heard counsel on both sides and considered this case, we are of opinion that the surrender of *John Hedger* the grandfather, bearing date 20th *October* 1735, does, by expreſs reference to the uſes declared by his will, adopt and apply the words of the will to theſe copyhold lands, as if the teſtator had been ſeiſed thereof at the time of making the ſaid will; and, therefore, they are ſubject to the ſame uſes to which all the teſtator's copyhold lands in the county of *Eſſex* are deviſed by his will.

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## RIDOUT and Another, Aſſignees, *verſus* BROUGH.

IN *aſſumpſit* the declaration conſiſted of five counts. 1ſt, For money had and received by the defendant *ſince* the bankruptcy to the uſe of the aſſignees. The 2d, 3d, and 4th were for money paid, *&c.* money lent, *&c.* and work and labour done by the *bankrupt before* the bankruptcy and *aſſumpſit* to the *aſſignees*. 5th. An account ſtated with the plaintiffs of money due to them *as aſſignees*.

The Statutes of ſet-off extend to aſſignees under a commiſſion of bankruptcy.

The defendant pleaded. 1ſt, *Non aſſumpſit*, on which iſſue was joined. 2d, A plea of ſet-off of 869 *l.* to the *whole* declaration, for a judgment obtained againſt the bankrupt for money lent and advanced, money had and received, *before* the bankruptcy. 3d, Another plea of ſet-off for money lent and advanced, money laid out and expended, and goods ſold and delivered to the plaintiffs *as aſſignees*, *ſince* the bankruptcy, and an account ſtated with them. To the 2d and 3d plea the plaintiffs demurred, and the defendant joined in demurrer.

Mr. *Cowper* (who argued from Mr. *Buller*'s notes in his abſence) in ſupport of the demurrer. 1ſt, Both pleas are bad, 2dly. The ſtatutes of ſet off do not extend in any caſe to aſſignees of a bankrupt.

1ſt Point. Each plea goes to the *whole* declaration, and if bad as to any one count, they are bad for the whole. 1 *Saunders*, 28. Lord *Mancheſter* v. *Vale*. 1 *Lev.* 48. *Webb* v. *Martin*. In this laſt caſe, in *aſſumpſit* on ſeveral promiſes, it was held by the court on demurrer, that if the defendant plead the ſtatute of limitation generally to the whole declaration, and the plea is ill as to one count, it is ill for the whole. So if an executor plead ſeveral judgments, and the plea is bad as to one judgment, it is bad in reſpect of all. 2 *Saund.* 50. Here the firſt count is for money had and received *ſince* the bankruptcy to the uſe of the aſſignees. Neither

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RIDOUT versus BADCOCK.

ther of the pleas is good as to this count. For if the defendant ſhould be admitted to ſet off a debt due *before* the bankruptcy againſt money which he received *ſince*, there would be an end of the bankrupt laws. Becauſe then every man who was the creditor of a bankrupt, would by indemnities or ſome other trick, after an act of bankruptcy committed, get money into his hands, and by that means pay himſelf in preference to other creditors.

The other counts in the declaration are for money due *to* the *bankrupt*, *before* the bankruptcy. The laſt plea is wholly for money due to the *defendant*, *ſince* the bankruptcy from the *aſſignees*, therefore, that the plea is for a demand on different perſons from him, to whom the money was due, which is the ground of action; for the demand ſet off in this plea never was a debt from the *bankrupt*, nor could an action have been brought againſt the bankrupt for it; therefore the debts are not mutual. All the debts in the declaration but the firſt were due to the bankrupt, none in this plea were due from him.

But further, the ſubject matter of the laſt plea is ſuch, as cannot exiſt in point of law; for it ſuppoſes debts to have been contracted by the aſſignees in their political character, as ſuch; namely, for goods ſold and delivered, money lent, *&c. &c.* to them as *aſſignees*. Taking it as a debt due from them in their private capacities, there cannot be the leaſt colour for the ſet-off, for that would be ſetting off the debt of *A.* againſt the debt of *B.*: and in their political capacities they have not the power or ability of contracting ſuch debts to charge the bankrupt's eſtate. Therefore, on theſe ſpecial grounds, applicable to this particular point, both pleas are bad.

2d Point. Both pleas are likewiſe bad on the general principle of law, that the ſtatutes of ſet-off do not extend in any caſe to aſſignees of bankrupts, and, therefore, are not tenable either on the ſtat. 2 *Geo.* 2. *c.* 22. or on the ſtat. 5 *Geo.* 2. *c.* 30.

Firſt, Under the ſtat. 2 *Geo.* 2. no debt can be ſet off againſt another which is not mutual; and theſe debts never were mutual: for part of the plaintiff's demand is for a debt accruing ſince the bankruptcy, for which the bankrupt never could have had an action, and the firſt plea is for a demand due from the bankrupt. The other part of the plaintiff's demand is for money due to the bankrupt. The laſt plea is for a demand due from the aſſignees ſince the bankruptcy; and, therefore, if an action had been brought by the bankrupt for that part of the plaintiff's demand, the ſubject matter of this laſt plea never could have been ſet

up

up as a defence againſt it, for at that time this debt did not exiſt. Therefore theſe debts are not mutual. 1774.

Secondly, Wherever there are mutual debts there muſt be mutual remedies; but in caſe of aſſignees there are not mutual remedies, for no action will lie againſt them. So determined in *Ryal* and *Larkin*, 1 *Wilſ.* 155. This caſe, according to another note, was conſidered both on the ſtatute of ſet-off and on the ſtat. 5 *Geo.* 2. and it was expreſsly holden not to be within the ſtatute of ſet-off, becauſe the defendant could not have an action againſt the aſſignees. RIDOUT verſus BROUGH.

Laſtly, This ſet-off cannot be ſupported under the ſtat. 5 *Geo.* 2. for that ſtatute expreſsly requires "that it ſhall be made appear to "the commiſſioners, *&c.* and on it's being ſo made appear they "or the aſſignees may ſtate the account," *&c.* But to take advantage of this ſtatute the party muſt conform to the proviſions of it; that is, he muſt apply to the commiſſioners, and if they act improperly, he muſt appeal to the great ſeal. Beſides in this caſe even the commiſſioners could not allow the ſet-off, for under this act there can be no ſet-off but where the debts are due before the bankruptcy. But here part of the plaintiff's demand accrued ſince the bankruptcy, and all the demand compriſed in the laſt plea likewiſe aroſe ſince the bankruptcy. Therefore, whether conſidered as a general queſtion of law on the ſtat. 2 *Geo.* 2. or on the ſtat. 5 *Geo.* 2. or on the particular circumſtances of this caſe, and the impropriety of each plea with reſpect to the different parts of the declaration, theſe pleas cannot be ſupported.

Mr. *Withers*, *contrà*, for the defendant, as to the ſecond point, cited 2 *Vern.* 117. *Chapman* v. *Derby*, and 2 *Kelynge* 24. *pl.* 19. *Ex parte Riley.*

The Court were clearly of opinion with him on this point, that the defendant might ſet off a debt due to him from the bankrupt; for the *aſſignees* are the *bankrupt*: and ſeemed to impeach the deciſion in 1 *Wilſ.* 155. "that the ſtatutes of ſet-off "do not extend to aſſignees under a commiſſion of bankruptcy," as againſt the general principles of law, juſtice, and good ſenſe. But they were equally clear on the firſt point, that the laſt plea was bad, and the ſecond badly pleaded, being to the whole declaration. But they gave the defendant leave to amend his plea, upon payment of coſts and other terms.

1774.

*Same day.*

## REX *verſus* STOKES.

One, in cuſtody upon an attachment for non payment of coſts under ſtat. 5 & 6 *W. & M. c.* 11. *ſect.* 3. may be diſcharged under the lords' act, 32 *Geo.* 2. *c.* 28. *ſect.* 13.

THE defendant had been convicted of an aſſault, and ſentenced to four months impriſonment which were expired: but he was continued in cuſtody on an attachment for non-payment of coſts taxed, purſuant to a recognizance entered into by him on his removal of the indictment from the quarter-ſeſſions.

Mr. *Lucas* had moved for his being diſcharged under the ſtat. 32 *Geo.* 2. *c.* 28. *ſect.* 13. commonly called the lords' act. Mr. *Cowper* now ſhewed for cauſe that this ſtatute does not relate to coſts accrued in *criminal* caſes. Mr. *Lucas* in ſupport of the rule inſiſted that the defendant was in execution, and therefore within the ſtat. 32 *Geo.* 2. *c.* 28. *ſect.* 13. the words of which are, that "if any perſon, *&c.* ſhall be charged in *execution* for "any ſum or ſums not exceeding in the whole 100*l.* &c." The Court inclined to think this caſe was not within the act, and the defendant was remanded.—But the next day Mr. Juſtice *Aſton* aſked Mr. *Lucas*, if he knew of any caſe where a perſon had been diſcharged out of cuſtody on the lords' act, upon an attachment in a *civil* ſuit; and mentioned the caſe of *Rex* v. *Stokes*, *Mich.* 23 *Geo.* 2. *B. R.* which was an application by the defendant, who was in cuſtody upon an attachment for a reſcous upon an execution, to be diſcharged under the act of *indemnity* 20 *Geo.* 2. *c.* 52. Upon ſhewing cauſe it was objected that the ſtatute in *ſect.* 26. contained an exception as to all perſons guilty of *contempts*. But *Lee* Chief Juſtice there ſaid, "it was not "a contempt within the proviſion of that ſection, the contempts "there excepted being confined to caſes where the rights of the "ſubject only are concerned, and, therefore, the court held "that the defendant was entitled to his diſcharge."—The contempts ſo excepted by that act are in caſes of proſecutions in the name of the crown, at the charge of a private party, and the words of exception are, "unleſs the defendant in ſuch pro-"ſecution ſhall pay to ſuch private proſecutor, his executor or "adminiſtrator, ſuch coſts as the court where, *&c.* ſhall award "to be paid." Now the words of the ſtat. 5 & 6 *Wm. & Mary*, *c.* 11. *ſ.* 3. are in ſubſtance the ſame as thoſe of the ſtat. 20 *Geo.* 2. *c.* 52. *ſect.* 26. namely; "that the court of *King's*

"*Bench*

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" *Bench* ſhall on conviction give reaſonable coſts to the *party* " injured, *&c.* who ſhall *proſecute*, &c. which coſts ſhall be " taxed according to the courſe of the court:" and therefore in reſpect of coſts it appears to me that theſe are in like manner rights of the ſubject, with which the crown under a general act of grace could not interfere: if ſo, I incline to think that this is as much a civil ſuit as the caſes excepted under the ſtat. 20 *Geo.* 2. *c.* 52. and it would be a very hard caſe, if the defendant could not be diſcharged under the lords' act, nor under a general act of pardon; for then he muſt be remedileſs.—*It was adjourned*, that precedents might be ſearched into.

Afterwards, on the laſt day of the term, Mr. *Lucas* cited a caſe from 5 *Viner's Abridgment*, title *Contempt* (D), *pl.* 10. *Baſtram* v. *Dennet*, where the court held " that an *attachment* " after a decree for diſmiſſion is in nature of an *execution* at " law, and a general pardon may pardon the *contempt*, but not " the *debt*." Mr. *Cowper contra*, inſiſted that there was no inſtance of a perſon in contempt being diſcharged under an inſolvent act: with reſpect to an attachment being in the nature of a civil action, it clearly was not: becauſe then the defendant might be declared againſt; but here he is not ſo in cuſtody of the marſhal as that he might be ſerved with a declaration.

Mr. Juſtice *Aſton*. (Lord *Mansfield* gone.) An attachment is an execution in a civil ſuit, and I apprehend it has long ſince been ſettled to be ſo. In the preſent caſe the contempt has no *relation* to the offence committed by the defendant, which, as far as public juſtice is concerned, has been ſufficiently purged by the impriſonment he has ſuffered: but it ariſes upon an act of parliament 5 *&* 6 *W. & M. c.* 11. which directs " the coſts " in theſe caſes to be taxed by the maſter, and unleſs paid in ten " days, an attachment to iſſue." This ſtage of the cauſe therefore, is merely of a *civil* nature; and a matter ſolely between *party* and *party* unconnected with the *offence* itſelf. It ſeems that no caſe in point has been found: But the ſtat. 9 *Geo.* 3. *c.* 26. for the relief of inſolvent debtors, is in my opinion a legiſlative recognition that they ſhall have the benefit in ſuch caſes. This laſt act indeed is temporary; but the lords' act is perpetual; and they are *in pari materiâ*: and therefore as the attachment is an execution for the *debt* to the *party*, whether the coſts are taxed by the maſter of the crown office, or on the civil ſide, the defendant is equally entitled to his diſcharge. If not, the conſequence muſt be impriſonment for life: for a general

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general pardon would not extend to him, as was agreed in the caſe of *Rex* v. *Stokes*. *Mich.* 23 *Geo.* 2.

Mr. Juſtice *Willes*. Theſe ſtatutes which are made in favour of the liberty of the ſubject, ought always to receive a liberal conſtruction. This is in all reſpects as a *civil debt*; and does not differ from the caſe of *other civil* demands. It ſeems to me that the ſtat. 9 *Geo.* 3. *c.* 26. meant to extend the benefit to inſolvent debtors in the fulleſt manner; and I am the more inclined to adopt a liberal conſtruction in this caſe, as the defendant, who is a *minor*, may otherwiſe lie in gaol for life.

Mr. Juſtice *Aſhhurſt*. I am of opinion that this caſe may fairly be included under the words "debtor and creditor" in the lords' act: and therefore think the defendant ought to be diſcharged: eſpecially, as otherwiſe he muſt be without remedy: becauſe the king cannot by a general pardon releaſe a *civil* debt; and no other alternative is open.

Rule made abſolute.

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*Monday, June* 20th.

BLANDFORD and others, executors of FROUD, *verſus* FOOTE.

If the cauſe of action ariſes before bankruptcy, intereſts and coſts accrued ſince, are likewiſe diſcharged, by ſtat. 12 *Geo.* 3. *c.* 47. *ſect.* 2.

UPON a rule to ſhew cauſe why the defendant who was an *uncertificated* bankrupt, and in cuſtody upon a *ca. ſa.* ſhould not be diſcharged under the ſtat. 12 *Geo.* 3. *c.* 47. *ſect.* 2. the facts appeared to be as follow. The defendant became indebted to the teſtator *Froud* upon bond in the year 1756, and about two years afterwards became bankrupt: ſubſequent to the bankruptcy, *Froud* brought an action upon the bond, obtained judgment, and died. After which, the executors brought a new action upon the judgment, and on this laſt action the defendant was now in cuſtody.

Mr. *Mansfield*, who ſhewed cauſe inſiſted, that the judgment upon which the defendant had been taken, being ſubſequent to the commiſſion ſued out, the defendant was not within the favour of the ſtatute; which expreſsly relates to any debt or debts due or contracted before ſuch commiſſion iſſued, and to ſuch debts only.

Mr. *Baldwin contra*. That the defendant ought to be diſcharged; for though the judgment was ſigned after the commiſſion iſſued, yet the cauſe of action was antecedent to the commiſſion, and therefore within the intention of the ſtatute.

Lord

Lord *Mansfield.* The only doubt that can arise in this case is with respect to the interest and costs accrued since the bankruptcy: but I think they stand upon the same foundation as the original debt which was clearly due before the bankruptcy, and therefore are equally within the benefit of the statute. 1774. BLANDFORD *versus* FOOTE.

Mr. Justice *Willes.* I am of the same opinion. A case of this sort once came before me, and I consulted with my brothers upon it, who all agreed that the whole related to the original debt, and therefore was within the act. Mr. Justice *Aston* and Mr. Justice *Ashhurst* concurred.

Rule made absolute.

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REX *versus* Overseers of BRIDGEWATER. *Same day.*

UPON shewing cause why several appointments of overseers should not be quashed, the case appeared to be a contest between two adverse sets of Borough Justices. Each set met before midnight of *Easter* eve: and each began making their appointments of overseers the instant the clock had struck twelve; and so kept on renewing the same appointments for an hour or two. But one set of them made a fresh appointment at eight o clock on the *Sunday* morning; supposing that there would be a contest concerning the priority of those appointments which were made soon after midnight, and perhaps all of them bad.

Mr. *Hotchkin* shewed cause, and cited 3 *Bur.* 1595. *Swan* v. *Broome*, to prove the appointments good.

Lord *Mansfield.* The conduct of the Justices in this case is a shameful prostitution and abuse of their office for election purposes; and I wish any person could be found who would undertake to prosecute both parties. It would have been more for the interest of either side to have waited for a legal appointment on the *Monday*. I do not know that there is any authority which says that an appointment made on a *Sunday* is good; but it certainly is not a day for such purposes as these; and therefore I will not give my sanction to any of the appointments. Let all the appointments be set aside, and a *mandamus* be directed to the justices to make a new appointment; and let the mayor give two days notice of the time and place of meeting for such new appointment.

The three other judges concurred.

*N. B.* The matter was afterwards agreed between the parties.

The

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GILLMAN *verſus* HILL.

ſhould not be made by the plaintiff, and why the warrant of attorney upon which the judgment was ſigned ſhould not be cancelled. The rule was obtained upon an affidavit, ſtating, that the warrant of attorney was given by the defendant, whilſt in cuſtody, without any attorney being preſent on his behalf, though he had propoſed to ſend for one: but was perſuaded by the ſheriff's officer, that the attorney's clerk, who attended for the plaintiff, would do as well. But now, upon reading the affidavit, it ſtated further, that the defendant was the more induced to ſign and execute the bond and warrant of attorney, becauſe he had before been informed, that if he did execute it under an arreſt, and without his attorney being preſent, it would be void.

Mr. *Buller* ſhewed for cauſe, that upon the face of this affidavit it was clear the defendant was fully apprized of the act he was about to do; and aſſented to the propoſal made with a manifeſt view to defraud the plaintiff.

Mr. *Bearcroft contra*, relied upon the two rules of court, *Paſ.* 15 *Car.* 2. and *Paſ.* 4 *Geo.* 2. the latter of which, taking notice of the great inconveniencies ariſing from a warrant of attorney to confeſs judgment by one in cuſtody being held good, if any attorney, though for the oppoſite party, was preſent, expreſsly provides, that for the future there ſhall be an attorney preſent on behalf of the defendant.

Lord *Mansfield*. I ſhall ſay of theſe rules, what the court of *Chancery* has often ſaid with reſpect to the ſtatute of frauds; *that no rule of the court ſhall be made an inſtrument of fraud.* Theſe rules were made for the protection of indigent defendants againſt the practices of hard deſigning plaintiffs; and therefore have admitted of many *exceptions* under *circumſtances*: as where a perſon who is in priſon at *one* man's ſuit, executes a warrant of attorney to confeſs judgment to *another* who did not arreſt him. There the judgment is well given; for the *cauſe* fails*; and therefore though within the *letter* it is not within the *intent* of the rule. Much leſs will the court ſuffer a defendant to convert that which was meant for his protection into an inſtrument of fraud and deceit: and here it is avowed by the defendant himſelf in his own affidavit that he intended to cheat the plaintiff. Therefore let the rule be diſcharged with coſts.

* 2 Lord *Raym.* 797. 3 *Bur.* 2793.

The three other judges concurred.

THE END OF TRINITY TERM.

# MICHAELMAS TERM

## 15 GEORGE III. B. R. 1774.

VALLEJO and another *verſus* WHEELER.

*Thurſday, Nov.* 10th.

THIS was an action on a policy of aſſurance upon goods on board the *Thomas* and *Matthew*, from *London* to *Seville*. The policy was made in the common form, with liberty to touch at any ports or places, &c. The loſs was aſſigned different ways in the declaration; *Firſt*, by ſtorms and perils of the ſea, in conſequence of which, the ſhip was obliged to go to *Dartmouth* to be repaired; and that afterwards, a further loſs happened by ſtorms, &c. *Secondly*, That it happened by ſtorms and perils of the ſeas in the voyage generally; and *Thirdly*, by the *barratry* of the maſter.

Barratry is every ſpecies of fraud or knavery in the maſter or mariners of a ſhip, by which the owners or freighters are injured; and a deviation, if ſuch, is barratry; whether the loſs happen during ſuch fraudulent voyage, or after. *Otherwiſe*, if the deviation be with their privity or conſent.

The cauſe was tried before Mr. Juſtice *Aſhhurſt* at *Guildhall*, at the ſittings after *Eaſter* term 1774, by a ſpecial jury. On the trial it was proved, that this ſhip was put up as a general ſhip from *London* to *Seville*, and was let to freight by one *Darwin*, who chartered her to *Brown* the captain. That it is the courſe of veſſels going on this voyage, to ſtop at ſome port in the weſt of *Cornwall*, to take in proviſions. That this ſhip having taken her cargo aboard, ſailed from *London* to the *Downs*; while ſhe lay there, all the other ſhips bound to the weſtward bore away; but ſhe ſtaid till the night after, and then ſailed to *Guernſey*, which was *out* of the *courſe* of the voyage. That the captain went there for his own convenience, to take in brandy and wine on his own account; after which he intended to proceed to *Cornwall*. That the night after the ſhip quitted *Guernſey*, ſhe ſprung a leak, which obliged her to put into *Dartmouth*.

When

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When ſhe was refitted ſhe ſet ſail again and proceeded for *Helford* in *Cornwall*, where it was always intended ſhe ſhould ſtop to take in proviſions; but in her way ſhe received further damage, and at her arrival was totally incapable of proceeding on the voyage, and the goods were much damaged.

It was attempted on the part of the defendant to prove, that *Willes* was the owner of the ſhip; that the voyage to *Guernſey* was on his account, and the goods taken on board there his property: but this evidence went little further than information and belief, except that it was proved, that when the ſhip arrived at *Helford*, the wine was delivered to him in his cellar.

The judge directed the jury, that if the going to *Guernſey* was *without the knowledge* of *Darwin*, it was barratry; and they ought to find for the plaintiff; but if done with his knowledge, then it was not barratry: and if they ſhould be of opinion that it was without the knowlege of *Darwin*, then he deſired them to ſay, whether they thought it was with the knowledge of *Willes* or not. The jury found a verdict for the plaintiff, and ſaid they thought the going to *Guernſey* was without the knowledge of *Darwin*, whom they looked upon to be the owner, but they thought it was with the knowlege of *Willes*.

In Trinity term laſt, a motion was made for a new trial; and on ſhewing cauſe all the counſel on each ſide were heard. The court then ſaid, there were two points in the caſe. *Firſt*, Whether to entitle the plaintiff to recover, the loſs muſt not have happened during the time of the barratry, or have been occaſioned immediately by the act of barratry. If a policy be on a ſhip, and the ſhip is ſeized for ſmuggling, that is barratry; but here the goods were not ſeized for ſmuggling, nor did the loſs happen during the act of barratry, but afterwards. *Secondly*, Whether though the ſhip were let to freight, the captain was not ſubject to the orders of the owners. If a ſhip be let out generally to freight, the freighter is owner for that voyage; but if there be only a covenant to carry goods, the owner of the veſſel would have the direction of her, and the hiring of the maſter and mariners.

The court ordered that the caſe ſhould ſtand over till this term, and be argued by one counſel on each ſide. It was now argued by Mr. *Buller* for the plaintiff, and Mr. *Alleyne* for the defendant.

For

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For the plaintiffs. The queſtion is, Whether the plaintiffs are entitled to recover for this damage from the underwriters? In order to ſupport their claim they inſiſt, that the conduct of the maſter in going to *Guernſey*, for the purpoſe and under the circumſtances mentioned, was *barratry*.

Suppoſing this to be barratry, then another queſtion will ariſe, namely, Whether the loſs ſuſtained by the plaintiffs was in conſequence of that barratry; or, whether that loſs ſtands ſo totally unconnected with the voyage to *Guernſey*, as to be quite unaffected by it?

In all the caſes that have occurred on barratry, different definitions of the word have been attempted; and the ſame conduct has been obſerved in the preſent caſe: however, there will not be much difficulty in determining what is meant by the term in its *general* ſenſe, whatever nicety may ariſe in fixing the *preciſe* limits of it, when occaſion requires that ſhould be done. Wherever a great nicety does ariſe, the inſured ſhould be entitled to the turn of the ſcale: for the end and view of inſuring is, to ſecure the merchant againſt all loſſes and misfortunes whatever: and ſo very liberal are the underwriters in theſe days of their profeſſions in policies of what they do inſure againſt, that ſome writers have thought it next to impoſſible that where a loſs does happen a doubt ſhould remain. *Molloy*, B. II. *cap.* 7. *ſect.* 7. ſays, "almoſt all thoſe curious "queſtions that former ages and the civilians according to the "marine law, nay and the common lawyers too, have controverted, are now out of debate. Scarce any misfortune that "can happen, or proviſion to be made, but the ſame is provided for in the policies that are now uſed: for they inſure "againſt heaven and earth, ſtreſs of weather, or whatſoever "detriment ſhall happen or come to the thing inſured."

Barratry in all the dictionaries is defined to be *fraus*, *dolus*, or *deceptio*. So are *Minſhew*, *Duſreſne*, and *Spelman*.

Fraud means not only a crime, but any wilful fault or evil deſign; and even a neglect, provided it be *craſſa negligentia*, will amount to barratry; which was the caſe of a maſter ſailing out of port without paying duties*. That caſe approaches the neareſt to the preſent of any that can be found, and even goes beyond it. That was merely a neglect, and might have been by accident, as well as deſign; but becauſe it ſubjected the ſhip to forfeiture, it was holden to be barratry.

* 1 Str. 582.

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In this caſe the conſequence was the ſame; for the act of the captain ſubjected the ſhip and the goods inſured to forfeiture: but the act done was infinitely worſe. It did not reſt merely in a non-feaſance, but was a formed premeditated ſcheme of running away with the ſhip out of the courſe of the voyage; done for an illegal purpoſe, for his own private benefit, without any excuſe or neceſſity, and neither for the benefit nor with the knowledge of the owner or freighter.

One definition of barratry given at the bar was, where the maſter and mariners conſpire together to run away with the ſhip. That certainly is one ſpecies of barratry; but it can never ſerve as a general deſcription of it; if it were, barratry could never be committed without the concurrence of the mariners as well as the maſter: the contrary of which is clear from the caſe of the maſter not paying duties, and from every other caſe on the ſubject: and barratry may be committed by the maſter alone, or by the ſailors alone. *Poſtlethwaite* in his *Dictio. Tr.* and *Com.* vol. 1. p. 214. ſays, "barratry is when the maſter "of a ſhip or the mariners cheat the owners or inſurers, whether "by running away with the ſhip, ſinking her, deſerting her, "or embezzling the cargo." The owners or inſurers are as much cheated and defrauded if the veſſel is run away with by the ſailors, as if it is run away with by the maſter. But *Poſtlethwaite* in 1 vol. 136, title *Aſſurance*, gives a definition of barratry which applies more immediately to the preſent caſe. He ſays "one ſpecies of barratry in a marine ſenſe is, when "the maſter of a ſhip defrauds the owners or inſurers by "carrying a ſhip a different courſe to their orders."

The only two caſes in the common law books that are worth mentioning are *Knight* verſus *Cambridge*, *Str.* 581. 1 Lord *Raym.* 1349. *S. C.* and *Stamma* verſus *Brown*. *Stra.* 1173. In the firſt of theſe caſes it is holden that barratry extends to every fraud of the maſter; and what is ſaid at the concluſion of that caſe, is the beſt doctrine that can prevail in inſurances. "The end of inſuring is to be ſafe at all events; and it would "be very prejudicial if the court were to be making loop-holes "to get out of policies. The inſurer knows the maſter, and "whether he can truſt him; and he that inſures againſt his run-"ning away with the ſhip, never imagined he might or would be "guilty of any other fraud." The principles of the ſecond caſe apply very ſtrongly to the preſent: for here there was a formed deſign to deceive the inſured; the captain did not go to *Guern-*

*ſey* for the benefit of his owners, but for his own benefit only; and in going there he acted inconſiſtent with his duty to his owners. 1774. VALLETT verſus WHEELER.

It was ſaid in the former argument, that it would be very extraordinary if the underwriter was to inſure againſt the act of perſons employed by the inſured, and who were unknown to the inſurer. As to that point, it is obſervable in the *firſt* place that this was a *general* ſhip; a circumſtance that is much relied on among merchants, and which in this caſe is by them eſteemed deciſive on the preſent ſubject. And there ſeems to be great reaſon for a diſtinction between a *general* ſhip, and one that is *let to freight* to a *ſingle* perſon only. The former carries the goods of all mankind; every man that chuſes is at liberty to load his goods aboard her; and the merchant who ſhips his goods in ſuch a veſſel, has no command over her. He does not hire or employ the maſter; neither is the maſter ſubject to his order or direction during the voyage. But in the caſe of a veſſel let to freight to one merchant only, and by him alone freighted, he may be ſuppoſed to employ the maſter, and have the direction of the veſſel and the voyage; and therefore whatever is done by the captain is to be conſidered as done by the merchant's ſervant.

But 2dly, it muſt be preſumed the maſter is known to the inſurer; if not, it is the inſurer's own fault, and he ſhall not avail himſelf of the want of ſuch knowledge. Every policy ſpecifies who is the maſter; and if the inſurer agrees by his contract (as in policies is often done) that any other perſon at the election of the inſured may go as maſter, that is waiving a perſonal knowledge of him; and no objection can then be made by the inſurer, for want of knowing who the maſter is. In this caſe *Brown*, who was the man that went as maſter, is the perſon mentioned in the policy.

If this queſtion were tried by the laws of any other mercantile country it would hardly admit of a doubt. 2d. *Magenſ. Ord. Middleb. ſect.* 14. *Ord. Rotterd. ſect.* 52. *Ord. Amſterd. ſect.* 6. *Ord. Hamb. tit.* 4. *ſect.* 6. *tit.* 5. *ſect.* 1. *tit.* 7. *ſect.* 1. *Ord. Stockholm, art.* 5. *f.* 11. 16. *art.* 6. *f.* 14. There is no ordinance of *Florence* that applies immediately to this point: but from the form of their policies, it may be collected what would be the determination of that place on the matter; for they inſure againſt all perils, misfortunes, and other caſes and accidents even ſuch as cannot be thought of. And in their

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ordinances there is a proviſion, that in caſe of a diſpute, the underwriter ſhall pay the money firſt and go to law afterwards. Theſe ordinances are founded on good ſenſe and ſound reaſon, when the nature of inſurances is conſidered: and in mercantile tranſactions, and ſuch general ſubjects as this is, no doubt, the laws of other countries will have their weight in the courts of *England*.

The end and meaning of an inſurance is, to enable one man, for a valuable conſideration, to put another in his place to a certain amount, for all riſks and perils which the firſt man may ſuſtain. All that is requiſite on the part of the aſſured in theſe contracts is, that they are made *bonâ fide* without fraud, concealment, or contrivance: and where that is done, the policies and ordinances of the different countries mentioned, ſeem all to agree in this, that every peril is inſured againſt, except ſuch as happen by the means, conſent, or privity of the inſured.

Inſurances in *England* are not meant, either by the law or the parties, to be narrower or more confined than policies in other countries; and though, after a loſs has happened, underwriters catch at every reed they can to avoid paying the inſurance money, yet if the queſtion were put to them at the time of underwriting, even *they* would not heſitate to declare themſelves liable for many accidents which are afterwards called into very ſerious debate.

Not long ago a queſtion was made, whether the underwriter ſhould be liable where the ſhip was not ſea worthy, but the defect unknown to the inſured. The underwriter ſucceeded, and was holden not to be liable; but what was the conſequence? A clauſe was inſerted in the policies (as it is in the preſent) that any inſufficiency in the ſhip, not known to the aſſured, ſhould not prejudice the inſurance; and the underwriters ſubſcribed with this clauſe for the ſame premium as they did before without it. This is a pretty ſtrong proof what they would have ſaid themſelves, if they had been aſked that queſtion before they under-wrote; though their opinions were altered after the loſs had happened: it is alſo a proof, that they conſidered their obligations to be as extenſive as thoſe on underwriters in other countries; and that they were anſwerable for all loſſes not occaſioned by the means, conſent, or knowledge of the inſured.

On theſe authorities and for theſe reaſons, it may be ſaid, the going to *Guernſey* in the manner and for the purpoſe the maſter of this veſſel did, was barratry: and it is the more certain,

tain, becauſe the court ſaid in the laſt term, that if this ſhip had been ſeiſed as forfeited on account of this ſmuggling tranſaction it clearly would have been barratry. Now the ſeizure could not be the act that conſtituted the barratry; but it muſt have been ſomething preceding: namely, the going to *Guernſey* for an illicit purpoſe, and doing an act which ſubjected the ſhip and goods to ſeizure. For in the caſe of not paying duties, it does not appear that any ſeizure was actually made; but it was holden barratry becauſe the goods were *liable to be* ſeized. 1774. VALLEJO verſus WARREN.

Suppoſing this to be barratry, then the only queſtion which remains is, Whether the loſs that the plaintiffs have ſuſtained was in conſequence of that barratry?

The beſt way of determining this queſtion is to ſee whether the accident would have happened if the ſhip had never gone to *Guernſey*; and it certainly would not: for the ſtorm happened and the accident was received before the ſhip got into her proper courſe to *Helford*. If ſhe had not gone to *Guernſey* ſhe would never have met with the ſtorm.

In the next place, ſuppoſe the ſhip had never gone to *Guernſey*, but had purſued her proper courſe and the goods had been damaged in the manner they now were; What would have been the conſequence with reſpect to the inſured? they would have been entitled to a ſatisfaction from the inſurers. What then ſhall excuſe the inſurers now? Shall the barratry of the maſter? there is nothing elſe to excuſe them: but barratry, inſtead of excuſing, makes the underwriter liable.

But 1ſt, It is not neceſſary that the injury ſhould be received, in the very act of committing the barratry: and 2dly, If it were, this injury was received during the act of barratry. What is the act of barratry? running away with the ſhip for an illegal purpoſe. The inſtant the maſter had changed the courſe of the ſhip's voyage, for the purpoſe he did, he had committed barratry. Muſt the injury then be received at the moment he varied his proper courſe, in order to charge the inſurer? Suppoſe the injury had been received juſt before he got to *Guernſey*, or in going into *Guernſey*, ſhould not the underwriter be liable? and if liable for a damage done before he got into *Guernſey*, why ſhall he not alſo be liable, for an injury ſuſtained after he left *Guernſey*?

If the inſurer were to be diſcharged from this loſs, becauſe it did not happen in the moment of the barratry's being committed,

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mitted, the condition of the inſured would be unfortunate indeed! for if it had not been for the barratry, and the loſs had happened, he certainly would have been entitled to the benefit of his policy; and therefore his condition would be this; by means of the barratry of the maſter, which is one of the accidents he inſures againſt, he would loſe his goods, and the benefit of his policy likewiſe.

But 2dly, this injury was received during the act of barratry. The maſter went to *Guernſey* in order to take contraband goods aboard his veſſel, and ſmuggle them to *England*. At the time the loſs happened he was bringing the ſmuggled goods to *England*, but he had not then completed his purpoſe; and was at that time purſuing his barratical deſign.

For all or ſome of theſe reaſons the plaintiffs would be entitled to the judgment of the court, even if the caſe had come on in a very different ſhape from what it now does.

But here the queſtion is, Whether the defendant is entitled through the favour and interpoſition of the court to a new trial, which the court will not grant, unleſs it be clear that the verdict is againſt law. If it be doubtful, the caſe ought not to undergo further litigation: for it has already been tried by a ſpecial jury of merchants, among whom was a very conſiderable underwriter. They who are converſant with buſineſs of this kind, have entertained no doubts; and the verdict given was with the entire approbation of the judge who tried the cauſe: therefore a new trial cannot be granted without reprobating the verdict that has already been given.

Mr. *Alleyne*, for the defendant argued, that barratry was,

1ſt. Where an injury is committed by the maſter and mariners, which cauſes a confiſcation.

2dly. Where a direct injury is done to the owners, with a direct intention to commit that injury.

Though in the preſent caſe a ſmall quantity of brandy was found on board the veſſel, which was confiſcable, yet this cargo was found not to be ſo.

Barratry means mal-practice, or deceit, with reſpect to ſhips or goods, *Savary Dictionnaire de Commerce, tit. Barratry. Molloy*, 2 *B.* 13. conſiders barratry as a mal-practice againſt the cargo. *Poſtlethwaite Dict. Trade* and *Commerce*, 214. "Barratry is "where the maſter of a ſhip, or mariners, cheat the owners or "inſurers

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" inſurers, whether by running away with the ſhip, ſinking her, " deſerting her, or embezzling the cargo." The act of the maſter is not inſured againſt, unleſs barratry is mentioned: and the underwriter is not liable, unleſs the act of the maſter does amount to barratry.

By the *Ord.* of *Retterd.* 43. 52. it is provided, " that owners " ſhall not inſure againſt the barratry of maſters of their own ap- " pointment, but may againſt his neglect." All the ordinances cited for the plaintiffs are open to this obſervation, that they are *poſitivi juris*.

If the doctrine laid down on the other ſide were to hold, every neglect of the maſter would amount to barratry.

In the caſe of *Johnſon* verſus *Proudfoot*, at the ſittings in *London*, it was holden, that a ſhip ſtaying in the *Weſt Indies* till the hurricanes came on, did not amount to barratry.

Lord MANSFIELD. That was holden to be a deviation.

Mr. *Alleyne*. Every deviation is not barratry. In *Stamma* verſus *Brown*, the chief juſtice did not ſay what was barratry: in *Elton* verſus *Brogden*, *Stra.* 1264, the crew oppoſed the captain, and forced him to go contrary to orders; and yet that was holden not to be barratry; but it was adjudged to be one of the accidents inſured againſt, and ſo the inſurers were liable. Therefore a conſequential injury is not within the meaning of barratry, but it muſt be direct and deſigned.

In this caſe *Darwin* was not the owner, neither did he appoint the maſter.

Laſtly, it cannot be contended that this was done with a view to defraud the owners, becauſe his intention was only to get a little money himſelf, without injuring them.

In reply, Mr. *Buller* inſiſted, that the voyage inſured was totally at an end, and it was impoſſible, after that, ever to get into what could be called the courſe of this voyage from *London* to *Seville*; for that having been deſerted, the policy was forfeited or diſcharged, and could never be brought into force again.

Though the ſhip and cargo in this caſe were not ſeized as forfeited, yet they were all liable to be forfeited, by having ſmuggled goods aboard: therefore the act done was equally unlawful; and would in law as much conſtitute barratry as if the goods had actually been ſeized.

With reſpect to the ſeveral definitions given of barratry in the books cited for the defendant, though they might properly comprehend ſome ſpecies of barratry, yet they did not

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import to be a general definition of it, and to comprehend all cases. *Postlethwaite* 1 vol. 136. is more general in his description of it, and more applicable to the present case; and the propriety of his definition has not been denied.

Though it may be true that the act of the master is not insured against unless barratry is mentioned in the policy; yet the reverse is equally true: namely, where barratry *is* mentioned, the act of the master, though done by him only, and without the concurrence of the crew, is insured against. And though by the *Ords.* of *Rotterdam*, an owner cannot insure against the barratry of a master of his own chusing, yet the law of *England* clearly is different: and notwithstanding the master is appointed by the owner, there is not a policy which amongst other perils does not guard against the barratry of the master.

It is true that all the ordinances cited are *positivi Juris*: and therefore if the law here is settled contrary to them, they cannot prevail; but if not, the law of foreign countries in mercantile transactions, has always been attended to in courts of Justice in *England*, and will afford a reasonable ground to decide in doubtful cases.

As to *Darwin*'s not being the owner, it has already been stated how far he appears to have been so; and in fact he did appoint the master for this voyage. And though the captain's principal view in this case might be to put money in his own pocket, yet that does not at all lessen the offence which he has been guilty of, or alter the fraud which he has practised against the owners. By going to *Guernsey* he has defrauded them, and unless that does amount to barratry, he has deprived them of all benefit of their insurances. In the case of sailing out of port without paying duties, the captain did not mean to steal the goods; he intended only to have put that money in his own pocket; and if he had not been detected would still have carried and delivered the goods in the destined voyage.

Here the act done was for the captain's private benefit, without the knowledge of the insured; on the contrary it was to their prejudice, it endangered the loss of their goods, destroyed the policy unless it amounted to a forfeiture of it; and was unlawful in itself, for which reason it amounted to barratry.

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Lord MANSFIELD, after ſtating the caſe at large, delivered his opinion as follows:

The ground of the motion for a new trial in this caſe is, that under the circumſtances of the caſe as they were given in evidence to the jury, the carrying the ſhip to *Guernſey* was merely a *deviation* but not *barratry*: and much more ſtreſs was laid at the trial, than in either of the arguments, upon this particular fact; namely, that the deviation being with the knowledge of *Willes* the owner (though not owner *pro hâc vice*) of the ſhip, it could never be barratry: the jury therefore were preſſed to ſay whether it was with the conſent of *Willes* or not; and they ſaid it was. To be ſure nothing is ſo clear, as that if the owner of a ſhip inſures and brings an action on the policy, he can never ſet up as a crime a thing done by his own direction or conſent. It was, therefore, a material fact to proceed upon, if *Willes* had had any thing to do in the caſe; but he had not.

It appeared to me that the nature of barratry had not been judicially conſidered, or defined in *England* with accuracy. In all mercantile tranſactions the great object ſhould be certainty: and therefore, it is of more conſequence that a rule ſhould be certain, than whether the rule is eſtabliſhed one way or the other. Becauſe ſpeculators in trade then know what ground to go upon. But it is not eaſy to collect with certainty from a general verdict, or from notes taken at *niſi prius*, what was the true ground of deciſion. Therefore in this as in all doubtful caſes, I wiſhed a caſe to be made for the opinion of the court.

It appeared on the former argument and now, that there are but three common law caſes relative to barratry. The firſt is *Knight* and *Cambridge*, *Strange* 581. where the neglect of the captain in not doing his duty, was adjudged barratry; for it was his duty to pay the port duties before the ſhip went out of port; and he being guilty of neglect in not diſcharging them, it was adjudged to amount to barratry.

The next is the caſe of *Stamma* verſus *Brown*; 2 *Str.* 1173, where the opinion of the chief juſtice in his direction to the jury is very ſtrong to the preſent caſe: the ſhip being chartered, and having taken goods on board for a voyage directed to *Marſeilles*, had paſſed by *Marſeilles*, and therefore went out of the voyage. The chief juſtice in his direction told the jury, that this being againſt the expreſs agreement to go firſt to *Marſeilles*, ſeemed not to be a ſimple deviation only, but a formed deſign to deceive

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ceive the contractor. The jury ſtayed out ſome time, and on their return aſked the chief juſtice, whether, if the maſter was to have no benefit to himſelf by paſſing by *Marſeilles*, and went only to the other places for the benefit of the owners, it would be barratry? The chief juſtice anſwered it would not. Whereupon the jury found a verdict for the defendant. Upon a motion for a new trial it was refuſed, becauſe it appeared to the court that notice had been given to the agent of the plaintiff, that the voyage was to be altered, and that he was at liberty to take his goods out of the ſhip, if he diſapproved of ſuch alteration; and to make it barratry, there muſt be ſomething of a criminal nature as well as a breach of contract.

The laſt common law caſe is, *Elton* verſus *Brogden*, 2 *Str.* 1264. In that caſe neither the terms of the firſt or ſecond policy are ſtated, and yet they muſt have been ſpecial. The only queſtion ſeems to have been, whether the capture of a *ſecond* prize juſtified the *ſecond* return of the ſhip to *Briſtol*. The court held it did: if ſo, there could be no barratry; becauſe the captain and mariners acted to the beſt of their judgment, for the *benefit* of the *owners*. Whatever excuſed the deviation, proved that the deviation could not be barratry. The circumſtances which induced the court to be of that opinion are not ſtated.

But theſe caſes do not afford any preciſe definition of what barratry is; therefore I wiſhed the cauſe to ſtand over to be argued by one counſel on a ſide. I have in the mean time conſidered of it, and conſulted with men converſant in mercantile affairs, and I am now very clear.

The firſt thing to be conſidered is, what is meant by barratry of the maſter. I take the word to have been originally introduced by the *Italians*, who were the firſt great traders of the modern world. In the *Italian Dictionary* the word "*Barratrare*" means to *cheat*, and whatſoever is by the maſter a cheat, a fraud, a cozening, or a trick, is barratry in him: nothing can be ſo general. Here the underwriter has inſured againſt all barratry of the maſter, and we are not now in a caſe of the owner or freighter being privy to it; if we were, nothing is ſo clear as that no man can complain of an act done, to which he himſelf is a party.

In the preſent caſe all relative to *Willes* may be laid out of it. He is originally the owner, but not the inſured here. *Darwin* was the freighter of the ſhip, and the goods that were on board were

were his: if any fraud is committed on the owner, it is committed on *Darwin*. The queſtion then is, What is the ground of complaint againſt the maſter? He had agreed to go on a voyage from *London* to *Seville*; *Darwin* truſts he will ſet out immediately; inſtead of which the maſter goes on an iniquitous ſcheme, totally diſtinct from the purpoſe of the voyage to *Seville*: that is a cheat, and a fraud on *Darwin*, who thought he would ſet out directly; and whether the loſs happened in the act of barratry, that is, *during* the fraudulent voyage or *after*, is immaterial; becauſe the voyage is equally altered, even though there is no other iniquitous intent. But in the preſent caſe, there is a great deal of reaſon to ſay, that the loſs ſuſtained was in conſequence of the alteration of the voyage. The moment the ſhip was carried from its right courſe, it was barratry; and here the loſs was immediately upon it. Suppoſe the ſhip had been loſt *afterwards*, what would have been the caſe of the inſured, if not ſecured againſt the barratry of the maſter? He would have loſt his inſurance, by the fraud of the maſter; for it was clearly a deviation; and the inſured cannot come on the underwriters for a loſs, in conſequence of a deviation. Therefore I am clearly of opinion, this ſmuggling voyage was barratry in the maſter. 1774. VALLEJO *verſus* WARREN.

ASTON, Juſtice.—I wonder that there ſhould remain a doubt at this time of day, what is meant by barratry in the maſter. In different ordinances different terms are uſed, but they all have the ſame meaning. In one of the ordinances of *Stockholm* it is called "*Knavery* of the maſters or mariners," and the facts ſtated in the preſent caſe clearly fall within that deſcription. Where it is a deviation with the conſent of the owner of the veſſel, and the maſter is not acting for his own private intereſt, in ſuch caſe it is nothing but a deviation with the conſent of the owner, and the underwriter is excuſed. In the preſent caſe the hulk of the ſhip belonged to *Willes*, but he had nothing to do with it, having chartered it to *Darwin*; the jury, therefore, did right to conſider *Darwin* as owner *pro hâc vice*. Having conſidered him in that light, the conduct of the maſter was clearly barratry. For he was acting for his own benefit, and without the conſent, or privity, or any intended good to his owner. Nobody knows when the firſt commencement of the injury happened; but moſt probably on the return of the ſhip to *Dartmouth* from *Guernſey*, where he had been for the purpoſe of ſmuggling. Therefore, I am clearly of opinion that this change of the voyage for an iniquitous purpoſe was barratry; which is not confined to the running

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ning away with the ſhip, but comprehends every ſpecies of fraud, knavery or criminal conduct in the maſter by which the owners or freighters are injured.

WILLES Juſtice concurred. The only doubt I had in this caſe was, when the loſs accrued; and I think it may reaſonably be ſaid to have happened in conſequence of the ſmuggling voyage: for if the ſhip had proceeded on her firſt intended courſe, ſhe would have eſcaped the ſtorm. Though this was a deviation, yet it is a juſt and fair rebutter to ſay, that it was barratry in the maſter, which is inſured againſt in the policy. I think the juſtice of the caſe is on the ſide of the plaintiffs, and therefore that there ought not to be a new trial.

ASHHURST Juſtice. I continue of the ſame opinion as I held at the trial: and I think the plaintiffs have a right to recover on either count in the declaration. *Firſt*, For the loſs at ſea. For it does not lie in the mouth of the inſurer to object on the ground of its being a deviation, and ſo prevent the plaintiffs from recovering on that count: becauſe the act of the maſter is a fraudulent act; and if the loſs is conſequential upon ſuch fraudulent act, it is barratry againſt which the party is inſured: and therefore the inſurers ſhall not object upon a fact which is itſelf a forfeiture of the policy.

*Secondly*, I think, for the reaſons already alleged by my Lord Chief Juſtice, and my Brethren, that it may fairly be ſaid, the loſs accrued in conſequence of the barratry of the maſter. Therefore I concur that the rule ſhould be diſcharged.

Mr. Juſtice *Willes* agreed with Mr. Juſtice *Aſhhurſt* that the plaintiffs were entitled to recover on either count.

Rule for a new trial diſcharged.

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*Saturday Nov.* 12th.

KENYON and others *verſus* LEVI SOLOMON.

One who was a bankrupt came from *Holland* with intent to ſurrender himſelf on the *forty-ſecond* day: but hearing his time was enlarged, reſolved not to ſurrender till the *enlarged* day. In the mean time he was arreſted; and the court held he ſhould not be diſcharged. For, till actual ſurrender, the ſtatute 5 *Geo.* 2. *c.* 30. meant to protect a bankrupt only during ſuch time as it might be reaſonable and convenient for him to come in and ſubmit himſelf to the commiſſion.

A Motion had been made to diſcharge the defendant out of cuſtody, as having been arreſted in coming to ſurrender himſelf as a bankrupt. The motion was grounded upon the ſtatute 5 *Geo.* 2. *c.* 30. *ſect.* 5. which enacts "that a bankrupt

" ſhall be free from arreſts, *in coming to ſurrender*, and from actual " ſurrender for the forty-two days, or ſuch further time as ſhall " be allowed for finiſhing his examination."

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The caſe as it appeared upon the defendant's own affidavit was as follows; that he came from *Holland* to *England* within the 42 days, with intent to ſurrender himſelf upon the 42d day: but finding that his time for ſurrendering himſelf had been enlarged to a further day, he then laid aſide his deſign of ſurrendering himſelf upon the 42d day, and did not mean to ſurrender himſelf till the enlarged day. In the intermediate time, he was arreſted by one of his creditors. The queſtion was, Whether he was privileged by this ſtatute, as " a bankrupt coming to " ſurrender himſelf?'

Upon ſhewing cauſe this day, Mr. *Dunning* argued that he was: Mr. *Wallace* and Mr. *Lucas* that he was not.

Lord MANSFIELD.—Nothing can be plainer than this caſe. The act allows a bankrupt 42 days to ſurrender in; but the ſooner he ſurrenders the better for the creditors. Therefore, to induce bankrupts to ſurrrender, a privilege is held out to them by *ſtat.* 5 *Geo.* 2. *c.* 30. namely, " that in coming to ſurrender, they " ſhall be free from arreſt, and alſo after actual ſurrender for the " ſpace of 42 days, or ſuch further time as ſhall be allowed for " finiſhing their laſt examination." But this is a *particular* privilege to enable them to ſurrender; and till actual ſurrender confined to the act of their going *with that view*; not a *general* privilege during the whole time which the act of Parliament allows them to ſurrender in. Nevertheleſs, if a bankrupt be abroad as this man was, and upon his return with an intention to ſurrender, is arreſted on his landing, or within a day or two after his arrival, before he can conveniently make his ſurrender, it would be too rigorous a conſtruction of the ſtatute to ſay, he ſhall not have a reaſonable time in which to execute ſuch intention; becauſe in fact he is on his way to ſurrender. But here the bankrupt, inſtead of ſurrendering on his arrival, ſwears he had no intention of doing ſo till the laſt moment of the time allowed him for finiſhing his laſt examination. There is no pretence, therefore, for ſaying he is within the privilege of being free from arreſts in coming to ſurrender; which muſt be confined, like the caſe of witneſſes arreſted in attending the court, to a reaſonable time *eundi et redeundi*; and beyond that the privilege does not extend.

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ASTON, Juſtice.—There is no ground or pretence for the defendant being diſcharged. Inſtead of ſurrendering himſelf in a reaſonable time after his arrival, he wilfully delays to ſurrender himſelf: and the meaning of the legiſlature was not to protect bankrupts, who withhold themſelves from their creditors during the whole length of time allowed for their ſurrender; but thoſe only who are active in ſubmitting themſelves to the ſeveral ſtatutes concerning bankrupts as ſoon as conveniently may be. Therefore I am clearly of opinion the defendant is not entitled to his diſcharge. Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

*Per. Cur.* Rule diſcharged.

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*Monday, Nov.* 14th.

*Lord Mansfield* abſent.

## NUNCOMAR *verſus* BURDETT.

MR. *Willes* moved that proceedings might be ſtaid till ſecurity ſhould be given to the defendant for his coſts, in caſe of the plaintiff's failing of ſucceſs; as the plaintiff's reſidence was in the *Eaſt Indies*, at *Calcutta* in *Bengal*.

ASTON, Juſtice.—It is every day refuſed. I have many notes of its being ſo.

Take nothing by the motion.

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*Tueſday, Nov.* 15th.

## DOE ex dim. PATE *verſus* DAVY.

IN ejectment brought for the recovery of certain premiſes in the manor of *Hampſtead* in the county of *Middleſex*; the jury found a verdict for the plaintiff, ſubject to the opinion of the court upon the following caſe.

That *William Davy* by his will dated the 2d of *April* 1767, duly atteſted by three witneſſes, after ſeveral legacies bequeathed to particular perſons, made the following reſiduary deviſe, "And "as to *all the reſt and reſidue* of my eſtate, of what nature, kind "and quality ſoever, I give, deviſe and bequeath the ſame unto "my ſaid brother *William Pate*, his heirs, executors and admi- "niſtrators, according to the nature of the reſpective eſtates." On the 16th of *May* 1768, the teſtator purchaſed a *cuſtomary* meſſuage ſituate in *Hampſtead*, to which he was admitted in fee; and afterwards ſurrendered it as follows: "To ſuch uſes, intents,

One having by will deviſed all the *reſidue* of his eſtate of what kind or quality ſoever to *W. P. afterwards* purchaſes *copyhold* lands, and ſurrenders them "to ſuch "uſes as he "*ſhall* by "his laſt "will de- "clare, li- "mit, and "appoint." He *afterwards* makes a *codicil*, and thereby *ratifies and confirms all and every the gifts*, deviſes and bequeſts in his ſaid will, except what he had altered by the codicil; and deſires the *codicil* may be annexed to, and taken as part of his will to all intents and purpoſes—This amounts to a *republication* of his will ſo as to make the after purchaſed copyhold lands paſs by the reſiduary deviſe.

"and

" and purpoſes as he the ſaid *William Davy ſhall* by his laſt will " and teſtament in writing thereof direct, limit, and appoint." On the 8th of *May* 1769 the teſtator purchaſed and was admitted to another piece of land, and ſurrendered it in the ſame manner. On the 18th of *Nov.* 1769, he made a codicil duly atteſted by three witneſſes; by which reciting, that he had by his will deviſed all his fee-farm rents in manner there mentioned, he deviſed the ſame to *Catharine Davy*, widow of his brother *John Davy*, and her aſſigns, during her natural life, together with his houſe, furniture, coach, *&c.* and then proceeds as follows; " *I do* " *hereby ratify and confirm all and every the gifts, deviſes, and bequeſts* " *contained in my ſaid will, except what I have hereby altered;* and " *I do define that this preſent writing may be annexed to and accepted* " *and taken as a codicil to my will to* ALL INTENTS AND PURPOSES." At the date of the will the teſtator had no copyhold lands; but at the date of the codicil he had the copyhold lands before mentioned. The queſtion was, Whether the copyhold lands paſſed to the plaintiff by the will?

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Mr. *Lee* for the plaintiff.—The copyhold lands do paſs. *Firſt*, If they had been purchaſed antecedent to the date of the will, the reſiduary deviſe, though ſilent as to copyhold lands, would have included them: for it has been decided, that copyhold lands paſs by a deviſe of all the teſtator's real eſtate. *Acherley* v. *Vernon*, 9 *Mod.* 75. The only queſtion then is, Whether the execution of the codicil, ſubſequent to the purchaſe and ſurrender of the copyhold eſtates, amounts to ſuch a republication of the will, as to paſs them? It clearly does; becauſe no preciſe form of words is neceſſary; but any which denote the continuance of the teſtator's mind, are ſufficient. Here the codicil has an expreſs reference to the will, and in terms ratifies and confirms every gift in it.

In *Heylin* v. *Heylin* * argued in this court laſt term, it was adjudged, that the circumſtance of a teſtator's expunging a legacy, coupled with an intermediate purchaſe and ſurrender of copyhold lands to the uſes of his will, amounted to a republication ſo as to paſs ſuch newly purchaſed copyhold lands. In *Potter* v. *Potter*, 1 *Ves.* 438. the teſtator by a ſecond codicil, on a ſeparate piece of paper, and without date, revoked ſo much of his will as ſhould be found to be inconſiſtent with ſuch codicil, and confirmed the reſt. In was held by Sir *J. Strange* Maſter of the Rolls, that this latter codicil was a republication, ſo as to paſs lands only contracted for at the date of the teſtator's will under

* *ante*, 130.

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the general words contained in the will, even if they had not paſſed before; which, however, *his Honour* inclined to think they had.

Here the teſtator directs the codicil to be annexed to his will; clearly, therefore, it is a republication; and conſequently the after-purchaſed copyhold lands paſs under the general reſiduary deviſe.

Mr. *Mansfield* for the defendant. The copyhold lands deſcend to the heir at law. At the date of the will the teſtator had no copyhold eſtate: clearly therefore he had no intention to paſs any copyhold eſtate to the deviſee. He afterwards purchaſes the copyholds in queſtion, and ſurrenders them "to ſuch uſes as "he *ſhall* declare by his laſt will;" not to the uſes "*declared* "or to be *declared* by his laſt will," as was the caſe of *Heylin* v. *Heylin*; and the ground upon which that caſe was decided; namely, that it was a republication by reference to uſes *already* declared by a will then exiſting. He then makes a codicil, whereby he ratifies and confirms every gift in his will, except what he had particularly altered by it. This is a ratification only of what he had before expreſsly given by his will, and nothing elſe. But the will contains no gift or deviſe of any *copyhold* lands, nor does the codicil refer to any. On the contrary, it is clear that the only object the teſtator had, in adding the codicil, was, to make the particular alteration there mentioned; conſequently the copyhold lands are undiſpoſed of, and the heir at law is entitled to them by deſcent.

Mr. *Lee* was going to reply: But Lord *Mansfield* aſked him, if he had ſeen the caſe of *Acherley* v. *Vernon*, as reported in *Comyn* 383. where the teſtator by a codicil, reciting, that he had made his ſaid will, adds "I hereby ratify and confirm my "ſaid will, except in the alterations aftermentioned;" and Lord Chancellor *Macclesfield* decreed, that the will was confirmed by the codicil; that the teſtator ſigning and publiſhing his codicil in the preſence of three witneſſes was a republication of his will, and both together made but one will; and by the ſaid will and codicil his fee-farm rents, and aſſart rents purchaſed after the will did well paſs. Lord *Mansfield* ſaid this caſe was deciſive of the queſtion.

*Aſton* Juſtice. It is an authority exactly in point. Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

*Per cur.* Let the *Poſtea* be delivered to the plaintiff.

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## MOSTYN *verſus* FABRIGAS.

*Tueſday, Nov. 24th.*

ON the 8th of *June*, in laſt term, Mr. Juſtice *Gould* came perſonally into court, to acknowledge his ſeal affixed to a bill of exceptions in this caſe; and errors having been aſſigned thereupon, they were now argued.

Treſpaſs and falſe imprisonment lies in *England* by a native *Minorquin*, againſt a governor of *Minorca*, for ſuch injury committed by him in *Minorca*.

This was an action of treſpaſs, brought in the Court of *Common Pleas* by *Anthony Fabrigas* againſt *John Moſtyn*, for an aſſault and falſe impriſonment; in which the plaintiff declared, that the defendant on the *firſt* of *September*, in the year 1771, with force and arms, *&c.* made an aſſault upon the ſaid *Anthony*, at *Minorca*, (to wit) at *London* aforeſaid, in the pariſh of St. *Mary le Bow*, in the ward of *Cheap*, and beat, wounded, and ill-treated him, and then and there impriſoned him, and kept and detained him in priſon there for a long time, (to wit) for the ſpace of *ten months*, without any reaſonable or probable cauſe, contrary to the laws and cuſtoms of this realm, and againſt the will of the ſaid *Anthony*, and compelled him to depart from *Minorca* aforeſaid, where he was then dwelling and reſident, and carried, and cauſed to be carried, the ſaid *Anthony* from *Minorca* aforeſaid, to *Carthagena*, in the dominions of the King of *Spain*, &c. to the plaintiff's damage of 10,000 *l.*

The defendant pleaded 1ſt. Not guilty; upon which iſſue was joined. 2dly. A ſpecial juſtification, that the defendant at the time, *&c.* and long before, was *governor* of the ſaid iſland of *Minorca*, and during all that time was inveſted with, and did exerciſe all the powers, privileges, and authorities, civil and military, belonging to the government of the ſaid iſland of *Minorca*, in parts beyond the ſeas; and the ſaid *Anthony*, before the ſaid time when, *&c.* (to wit) on the ſaid *firſt* of *September*, in the year aforeſaid, at the iſland of *Minorca* aforeſaid, was guilty of a riot, and was endeavouring to raiſe a mutiny among the inhabitants of the ſaid iſland, in breach of the peace: whereupon the ſaid *John* ſo being governor of the ſaid iſland of *Minorca* as aforeſaid, at the ſaid time, when, *&c.* in order to preſerve the peace and government of the ſaid iſland, was obliged to, and did then and there order the ſaid *Anthony* to be baniſhed from the ſaid iſland of *Minorca*; and in order to baniſh the ſaid *Anthony*, did then and there gently lay hands upon the ſaid *Anthony*, and did then and there ſeize and arreſt him, and did

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keep and detain the ſaid *Anthony*, before he could be baniſhed from the ſaid iſland, for a ſhort ſpace of time, (to wit) for the ſpace of ſix days, then next following; and afterwards, to wit, on the 7th of *September*, in the year aforeſaid, at *Minorca* aforeſaid, did carry, and cauſe to be carried, the ſaid *Anthony*, on board a certain veſſel, from the iſland of *Minorca* aforeſaid, to *Carthagena* aforeſaid, as it was lawful for him to do, for the cauſe aforeſaid; which are the ſame making the ſaid aſſault upon the ſaid *Anthony*, in the firſt count of the ſaid declaration mentioned, and beating, and ill-treating him, and impriſoning him, and keeping and detaining him in priſon for the ſaid ſpace of time, in the ſaid firſt count of the ſaid declaration mentioned, and compelling the ſaid *Anthony* to depart from *Minorca* aforeſaid, and carrying and cauſing to be carried the ſaid *Anthony* from *Minorca* to *Carthagena*, in the dominions of the King of *Spain*, whereof the ſaid *Anthony* has above complained againſt him, and this he is ready to verify; wherefore he prays judgment, *&c.* without this, that the ſaid *John* was guilty of the ſaid treſpaſs, aſſault, and impriſonment, at the pariſh of St. *Mary le Bow*, in the ward of *Cheap*, or elſewhere, *out* of the ſaid iſland of *Minorca* aforeſaid. *Replication de injuria ſuâ propriâ abſq. talı cauſâ.* At the trial the jury gave a verdict for the plaintiff, upon both iſſues, with 3000 *l.* damages, and 90 *l.* coſts.

The ſubſtance of the evidence, as ſtated by the bill of exceptions, was as follows: On behalf of the *plaintiff*, that the defendant, at the iſland of *Minorca* on the 17th of *September* 1771, ſeized the plaintiff, and, without any trial, impriſoned him for the ſpace of ſix days againſt his will, and baniſhed him for the ſpace of twelve months from the ſaid iſland of *Minorca* to *Carthagena* in *Spain*. On behalf of the *defendant*; that the plaintiff was a *native* of *Minorca*, and at the time of ſeizing, impriſoning, and baniſhing him as aforeſaid, was an inhabitant of and reſiding in the *Arraval* of St. *Phillip*'s, in the ſaid iſland; that *Minorca* was ceded to the Crown of *Great Britain*, by the treaty of *Utrecht*, in the year 1713. That the *Minorquins* are in general governed by the *Spaniſh* laws, but when it ſerves their purpoſe plead the *Engliſh* laws; that there are certain magiſtrates, called *the chief juſtice criminal*, and *the chief juſtice civil*, in the ſaid iſland: that the ſaid iſland is divided into four diſtricts, excluſive of the *Arraval* of St. *Phillip*'s; which the witneſs always underſtood to be ſeparate and diſtinct from

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the others, and under the immediate order of the governor; ſo that no magiſtrate of *Mahon* could go there to exerciſe any function, without leave firſt had from the governor: that the *Arraval* of St. *Phillip*'s is ſurrounded by a line wall on one ſide, and on the other by the ſea, and is called the *Royalty*, where the governor has greater power than any where elſe in the iſland; and where the judges cannot interfere but by the governor's conſent; that nothing can be executed in the *Arraval but by the governor's leave*, and the judges have applied to him the witneſs, for the governor's leave to execute proceſs there. That for the trial of murder and other great offences committed within the ſaid *Arraval*, upon application to the governor, he generally appoints the *aſſeſſeur criminal* of *Mahon*, and for leſſer offences, the *muſtaſtaph*; and that the ſaid *John Moſtyn*, at the time of the ſeizing, impriſoning, and baniſhing the ſaid *Anthony*, was the governor of the ſaid iſland of *Minorca*, by virtue of certain letters patent of his preſent Majeſty. Being ſo governor of the ſaid iſland, he cauſed the ſaid *Anthony* to be ſeized, impriſoned, and baniſhed, as aforeſaid, without any reaſonable or probable cauſe, or any other matter alleged in his plea, or any act tending thereto.

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This caſe was argued this term, by Mr. *Buller*, for the plaintiff in error, and Mr. *Peckham*, for the defendant. Afterwards, in *Hilary Term* 1775, by Mr. Serjeant *Walker*, for the plaintiff, and Mr. Serjeant *Glynn*, for the defendant.

For the plaintiff in error. There are two queſtions, 1ſt, Whether in any caſe an action can be maintained in this country for an impriſonment committed at *Minorca*, upon a native of that place?

2dly. Suppoſing an action will lie againſt any other perſon, Whether it can be maintained againſt the governor, acting as ſuch, in the peculiar diſtrict of the *Arraval* of St. *Phillip*'s?

In the diſcuſſion of both theſe queſtions, the conſtitution of the iſland of *Minorca*, and of the *Arraval* of St. *Phillip*'s, are material. Upon the record it appears, that by the treaty of *Utrecht*, the inhabitants had their own property and laws preſerved to them. The record further ſtates, that the *Arraval* of St. *Phillip*'s, where the preſent cauſe of action aroſe, is *ſubject* to the immediate *controul* and order of the *governor only*, and that no judge of the iſland can execute any function there, without the particular leave of the governor for that purpoſe. 1ſt. If that be ſo, and the *Law Loci* differs from the law of this coun-

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try; the *Lex Loci* muſt decide, and not the law of this country. The caſe of *Robinſon* verſus *Bland*, 2 *Bur.* 1078. does not interfere with this poſition; for the doctrine laid down in that caſe is, that where a tranſaction is entered into between *Britiſh* ſubjects, with a view to the law of *England*, the law of the *place* can never be the rule which is to govern. But where an act is done, as in this caſe, which by the law of *England* would be a crime, but in the country where it is committed, is no crime at all, the *Lex Loci* cannot be the rule. It was ſo held by Lord C. J. *Pratt*, in the caſe of *Pons* verſus *Johnſon*, and in a like caſe of *Balliſter* verſus *Johnſon*, ſittings after *Trinity* term 1765.

2d. In criminal caſes, an offence committed in foreign parts, cannot, except by particular ſtatutes, be tried in this country. 1ſt. *Vezey*, 246. The *Eaſt India Company* verſus *Campbell*. If crimes committed abroad cannot be tried here, much leſs ought civil injuries, becauſe the latter depend upon the police and conſtitution of the country where they occur, and the ſame conduct may be actionable in one country, which is juſtifiable in another. But in crimes, as murder, perjury, and many other offences, the laws of moſt countries take for their baſis the law of God, and the law of nature; and therefore, though the trial be in a different country from that in which the offence was committed, there is a greater probability of diſtributing equal juſtice in ſuch caſes than in civil actions. In *Keilwey*, 202. it was held that the Court of *Chancery* cannot entertain a ſuit for dower in the *Iſle of Man*, though it is part of the territorial dominions of the crown of *England*. 3d. The caſes where the courts of *Weſtminſter* have taken cognizance of tranſactions ariſing abroad, ſeem to be wholly on contracts, where the laws of the foreign country have agreed with the laws of *England*, and between *Engliſh* ſubjects; and even there it is done by a legal fiction; namely, by ſuppoſing under a *videlicet*, that the cauſe of action did ariſe within this country, and that the place abroad, lay either in *London* or in *Iſlington*. But where it appears upon the face of the record, that the cauſe of action did ariſe in foreign parts, there it has been held that the court has no juriſdiction. 2 *Lutw.* 946. Aſſault and falſe impriſonment of the plaintiff, at *Fort St. George*, in the *Eaſt Indies*, in parts beyond the ſeas; *viz.* at *London*, in the pariſh of St. *Mary le Bow*, in the ward of *Cheap*. It was reſolved, by the whole court, that the declaration was ill, becauſe the treſ-

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paſs is ſuppoſed to be committed at *Fort St. George*, in parts beyond the ſeas, *videlicet*, in *London*; which is repugnant and abſurd: and it was ſaid, by the chief juſtice, that if a bond bore date at *Paris*, in the kingdom of *France*, it is not triable here. In the preſent caſe, it does appear upon the record, that the offence complained of was committed in parts beyond the ſeas, and the defendant has concluded his plea with a traverſe, that he was not guilty in *London*, in the pariſh of *St. Mary le Bow*, or elſewhere, *out* of the iſland of *Minorca*. Beſides, it ſtands admitted by the plaintiff; becauſe if he had thought fit to have denied it, he ſhould have made a new aſſignment, or have taken iſſue on the place. Therefore as Juſtice *Dodderidge* ſays, in *Latch* 4. the court muſt take notice, that the cauſe of action aroſe out of their juriſdiction.

Before the ſtatute of *Jeofails*, even in caſes the moſt tranſitory, if the cauſe of action was laid in *London*, and there was a local juſtification, as at *Oxford*, the cauſe muſt have been tried at *Oxford*, and not in *London*. But the ſtatute of *Jeofails* does not extend to *Minorca*: therefore this caſe ſtands entirely upon the common law; by which the trial is bad, and the verdict void.

The inconveniences of entertaining ſuch an action in this country are many, but none can attend the rejecting it. For it muſt be determined by the law of this country, or by the law of the place where the act was done. If by our law, it would be the higheſt injuſtice, by making a man who has regulated his conduct by one law, amenable to another totally oppoſite. If by the law of *Minorca*, how is it to be proved? There is no legal mode of certifying it, no proceſs to compel the attendance of witneſſes, nor means to make them anſwer. The conſequence would be to encourage every diſaffected or mutinous ſoldier to bring actions againſt his officer, and to put him upon his defence without the power of proving either the law or the facts of his caſe.

II. Point. If an action would lie againſt any other perſon, yet it cannot be maintained againſt the Governor of *Minorca*, acting as ſuch, within the *Arraval* of St. *Phillip*'s.

The Governor of *Minorca*, at leaſt within the diſtrict of St. *Phillip*'s, is abſolute: both the civil and criminal juriſdiction veſt in him as the *ſupreme power*, and as ſuch he is accountable to none but God. But ſuppoſing he were not abſolute, in this caſe, the act complained of was done by him in a judicial ca-

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pacity as criminal judge; for which no man is anſwerable. 1 *Salk.* 396. *Groenvelt* verſus *Burwell.* 2 *Mod.* 218. *Show. Parl.* caſes 24. *Dutton* verſus *Howell*, are in point to this poſition; but more particularly the laſt caſe; where in treſpaſs, aſſault, and falſe impriſonment, the defendant juſtified as Governor of *Barbadoes*, under an order of the council of ſtate in *Barbadoes*, made by himſelf and the council, againſt the plaintiff (who was the deputy governor), for mal-adminiſtration in his office; and the Houſe of Lords determined, that the action would not lie here. All the grounds and reaſons urged in that caſe, and all the inconveniences pointed out againſt that action, hold ſtrongly in the preſent. This is an action brought againſt the defendant for what he did as judge; all the records and evidence which relate to the tranſaction are in *Minorca*, and cannot be brought here; the laws there are different from what they are in this country; and as it is ſaid in the concluſion of that argument, government muſt be very weak indeed, and the perſons intruſted with it very uneaſy, if they are ſubject to be charged with actions here, for what they do in that character in thoſe countries. Therefore, unleſs that caſe can be materially diſtinguiſhed from the preſent, it will be an authority, and the higheſt authority that can be adduced, to ſhew that this action cannot be maintained; and that the plaintiff in error is entitled to the judgment of the court.

Mr. *Peckham*, for the defendant in error. 1ſt. The objection to the juriſdiction is now too late; for wherever a party has once ſubmitted to the juriſdiction of the court, he is for ever after precluded from making any objection to it. *Year book* 22. *H.* 6. *fol.* 7. *Co. Litt.* 127. *b. T. Raym.* 34. 1 *Mod.* 81. 2 *Mod.* 273 2 Lord *Raym.* 884. 2 *Vern.* 483.

*Secondly*, An action of treſpaſs can be brought in *England* for an injury done abroad. It is a tranſitory action, and may be brought any where. *Co. Litt.* 282. 12 *Co.* 114. *Co. Litt.* 261. *b.* where Lord *Coke* ſays, that an obligation made beyond ſeas, at *Bourdeaux* in *France*, may be ſued here in *England*, in what place the plaintiff will. Captain *Parker* brought an action of treſpaſs and falſe impriſonment againſt Lord *Clive* for injuries received in *India*, and it was never doubted but that the action did lie. And at this time there is an action depending between *Gregory Cojimaul*, an *Armenian* merchant, and Governor *Verelſt*, in which the cauſe of action aroſe in *Bengal*. A bill was filed by the Governor in the Exchequer for an injunction, which was granted:

granted; but on appeal to the House of Lords, the injunction was dissolved; therefore the supreme court of judicature, by dissolving the injunction, acknowledged that an action of trespass could be maintained in *England*, though the cause of action arose in *India*. 1774. MOSTYN *versus* FABRIGAS.

*Thirdly*, There is no disability in the plaintiff which incapacitates him from bringing this action. Every person born within the ligeance of the King, though without the realm, is a natural born subject, and as such, is entitled to sue in the King's courts. *Co. Lit.* 129. The plaintiff, though born in a conquered country, is a subject, and within the ligeance of the King. 2 *Burr.* 858.

In 1 *Salk.* 404. upon a bill to foreclose a mortgage in the island of *Sarke*, the defendants pleaded to the jurisdiction, *viz.* that the island was governed by the laws of *Normandy*, and that the party ought to sue in the courts of the island, and appeal. But Lord Keeper *Wright* overruled the plea; "otherwise there "might be a failure of justice if the chancery could not hold "plea in such case, the party being here." In this case both the parties are upon the spot. In the case of *Ramkissenseat* v. *Barker*, upon a bill filed against the representatives of the Governor of *Patna*, for money due to him as his Banyan; the defendant pleaded, that the plaintiff was an alien born, and an alien infidel, and, therefore, could have no suit here. But Lord *Hardwicke* said, "as the plaintiff's was a mere personal demand, it was "extremely clear that he might bring a bill in this court;" and he overruled the defendant's plea without hearing one counsel on the other side.

The case of the Countess of *Derby*, *Keilwey*, 202, does not affect the present question; for that was a claim of dower, which is a *local* action, and cannot, as a transitory action, be tried anywhere. The other cases from *Latch* and *Lutwyche*, were either local actions, or questions upon demurrer; therefore not applicable to the case before the court; for a party may avail himself of many things upon a demurrer, which he cannot by a writ of error. The true *distinction* is between *transitory* and *local* actions; the former of which may be tried any where; the latter cannot, and this is a transitory action. But there is one case which more particularly points out the distinction, which is the case of Mr. *Skinner*, referred to the twelve judges from the council board. In the year 1657, when trade was open to the *East Indies*, he possessed himself of a house and warehouse, which he filled

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with goods at *Jamby*, and he purchaſed of the King at *Great Jamby* the iſlands of *Baretha*. The agents of the *Eaſt India* Company *aſſaulted his perſon*, ſeiſed his warehouſe, *carried away his goods*, and took and *poſſeſſed* themſelves of the *Iſlands* of *Baretha*. Upon this caſe it was propounded to the judges, by an order from the King in council, dated the 12th *April*, 1665, "Whether Mr. *Skinner* could have a full relief in any ordinary "court of law?" Their opinion was, "That his Majeſty's ordi- "nary courts of juſtice at *Weſtminſter* can give relief for taking "away and ſpoiling his ſhip, goods and papers, and aſſaulting "and wounding his perſon, notwithſtanding the ſame was done "beyond the ſeas. But that as to the detaining and *poſſeſſing* of "the *houſe* and *iſlands* in the caſe mentioned, he is not relievable "in any ordinary court of juſtice." It is manifeſt from this caſe that the twelve judges held, that an action might be maintained here for ſpoiling his goods, and ſeizing his perſon, becauſe an action of treſpaſs is a *tranſitory* action; but an action could not be maintained for poſſeſſing the houſe and land, becauſe it is a *local* action.

4th. point. It is contended that General *Moſtyn* governs as all abſolute ſovereigns do, and that *ſtet pro ratione voluntas* is the only rule of his conduct. From whom does the Governor derive this deſpotiſm? Not from the King, for the King has no ſuch power, and, therefore, cannot delegate it to another. Many caſes have been cited and much argument has been adduced, to prove that a man is not reſponſible in an action for what he has done as a judge; and the caſe of *Dutton* v. *Howell* has been much dwelt upon; but that caſe has not the leaſt reſemblance to the preſent. The ground of that deciſion was, that Sir *John Dutton* was acting with his council in a judicial capacity, in a matter of public accuſation, and agreeable to the laws of *Barbadoes*, and only let the law take its courſe againſt a criminal. But Governor *Moſtyn* neither ſat as a military or as civil judge; he heard no accuſation; he entered into no proof; he did not even ſee the priſoner; but in direct oppoſition to all laws, and in violation of the firſt principles of juſtice, followed no rule but his own arbitrary will, and went out of his way to perſecute the innocent. If that be ſo, he is reſponſible for the injury he has done: and ſo was the opinion of the court of *C. B.* as delivered by Lord Chief Juſtice *De Grey* on the motion for a new trial. If the Governor had ſecured him, ſaid his Lordſhip, nay, if he had merely committed him, that he might have been amenable to juſtice;

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juſtice; and if he had immediately ordered a proſecution upon any part of his conduct, it would have been another queſtion; but the governor knew he could no more impriſon him for a twelvemonth (and the baniſhment for a year is a continuation of the original impriſonment) than that he could inflict the torture. Lord *Bellamont*'s caſe, 2 *Salk.* 625. *Paſ.* 12 *W.* 3. is a caſe in point to ſhew that a governor abroad is reſponſible here: and the *ſtat.* 12 *W.* 3. paſſed the ſame year for making governors abroad amenable here in *criminal* caſes, affords a ſtrong inference that they were already anſwerable for *civil* injuries, or the legiſlature would at the ſame time have provided againſt that miſchief. But there is a late deciſion not diſtinguiſhable from the caſe in queſtion. *Comyn* v. *Sabine*, governor of *Gibraltar*, *Mich.* 11 *Geo.* 2. The declaration ſtated, that the plaintiff was a maſter carpenter of the office of ordnance at *Gibraltar*, that governor *Sabine* tried him by a court martial to which he was not ſubject, that he underwent a ſentence of 500 laſhes; and that he was compelled to depart from *Gibraltar*, which he laid to his damage of 10,000 *l.* The defendant pleaded not guilty, and juſtified under the ſentence of the court martial. There was a verdict for the plaintiff, with 700 *l.* damages. A writ of error was brought, but the judgment affirmed.

With reſpect to the *Arraval* of St. *Philip*'s being a peculiar diſtrict under the immediate authority of the governor alone, the opinion of Lord Chief Juſtice *de Grey* upon the motion for a new trial is a complete anſwer: "One of the witneſſes in the "cauſe (ſaid his Lordſhip) repreſented to the jury, that in ſome "particular caſes, eſpecially in criminal matters, the governor "reſident upon the iſland does exerciſe a legiſlative power. It "was groſs ignorance in that perſon to imagine ſuch a thing; I "may ſay it was impoſſible, that a man who lived upon the "iſland in the ſtation he had done, ſhould not know better, "than to think that the governor had a civil and criminal power "in him. The governor is the king's ſervant; his commiſſion "is from him, and he is to execute the power he is inveſted with "under that commiſſion; which is, to execute the laws of "*Minorca*, under ſuch regulations as the King ſhall make in "council. It was a vain imagination in the witneſſes to ſay, "that there were five terminos in the iſland of *Minorca*; I have "at various times, ſeen a multitude of authentic documents "and papers relative to that iſland, and I do not believe that in "any one of them, the idea of the *Arraval* of St. *Philip's* being "a diſtinct

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*Hic est damnatus inani judicio;*

and to the *Minorquins*, if Mr. *Fabrigas* should be deprived of that satisfaction in damages which the jury gave him,

*At tu victrix provincia ploras.*

Lord MANSFIELD.—Let it stand for another argument. It has been extremely well argued on both sides.

On *Friday* 27th *January*, 1775, it was very ably argued by Mr. Serjeant *Glynn*, for the plaintiff, and by Mr. Serjeant *Walker* for the defendant.

Lord MANSFIELD.—This is an action brought by the plaintiff against the defendant, for an assault and false imprisonment; and part of the complaint made being for banishing him from the Island of *Minorca* to *Carthagena* in *Spain*, it was necessary for the plaintiff, in his declaration, to take notice of the real place where the cause of action arose: therefore, he has stated it to be in *Minorca*; with a *videlicet*, at *London*, in the parish of St. *Mary le bow*, in the ward of *Cheap*. Had it not been for that particular requisite, he might have stated it to have been in the County of *Middlesex*. To this declaration the defendant put in two pleas. *First*, "not guilty;" *secondly*, that he was governor of *Minorca* by letters patent from the crown; that the plaintiff was raising a sedition and mutiny; and that in consequence of such sedition and mutiny, he did imprison him, and send him out of the island; which as governor, being invested with all the privileges, rights, &c. of governor, he alleges he had a right to do. To this plea the plaintiff does not demur, nor does he deny that it would be a justification in case it were true: but he denies the truth of the *fact*, and puts in issue whether the

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*fact* of the plea is true. The plea avers that the aſſault for which the action was brought aroſe in the iſland of *Minorca*, *out* of the realm of *England* and no where elſe. To this the plaintiff has made no new aſſignment, and therefore by his replication he *admits* the *locality* of the cauſe of action.

Thus it ſtood on the pleadings. At the trial the plaintiff went into the evidence of his caſe, and the defendant into evidence of his; but on behalf of the defendant, evidence different from the facts alleged in this plea of juſtification was given, to ſhew that the *Arraval* of *St. Phillips*, where the injury complained of was done, was not within either of the four precincts, but is a diſtrict of itſelf more immediately under the power of the governor; and that no judge of the iſland can exerciſe juriſdiction there, without a ſpecial appointment from him. Upon the facts of the caſe the judge left it to the jury, who found a verdict for the plaintiff, with 3,000 *l.* damages. The defendant has tendered a bill of exceptions, upon which bill of exceptions the cauſe comes before us: and the great difficulty I have had upon both the arguments, has been to be able clearly to comprehend what the queſtion is, which is meant ſeriouſly to be brought before the court.

If I underſtand the counſel for governor *Moſtyn* right, what they ſay is this: The plea of not guilty is totally immaterial; and ſo is the plea of juſtification: becauſe upon the plaintiff's own ſhewing it appears, 1ſt, that the cauſe of action aroſe in *Minorca*, *out* of the realm; 2dly, that the defendant was governor of *Minorca*, and by virtue of ſuch his authority impriſoned the plaintiff. From thence it is argued, that the judge who tried the cauſe ought to have refuſed any evidence whatſoever, and to have directed the jury to find for the defendant: and three reaſons have been aſſigned. One, inſiſted upon in the former argument, was, that the plaintiff, being a *Minorquin*, is incapacitated from bringing an action in the King's courts in *England*. To diſpoſe of that objection at once, I ſhall only ſay, it is wiſely abandoned to day; for it is impoſſible there ever could exiſt a doubt, but that a ſubject born in *Minorca* has as good a right to appeal to the King's courts of juſtice, as one who is born within the ſound of *Bow* bell: and the objection made in this caſe, of its not being ſtated on the record that the plaintiff was born ſince the treaty of *Utrecht*, makes no difference. The two other grounds are, 1ſt. That the defendant being *governor* of *Minorca*, is anſwerable for no injury whatſoever done by him in that capacity. 2dly, That the injury being done at *Minorca*, *out* of the realm, is

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not cognizable by the King's courts in *England*.—As to the firſt, nothing is ſo clear as that to an action of this kind the defendant if he has any juſtification muſt plead it; and there is nothing more clear, than that if the court has not a *general juriſdiction* of the ſubject-matter, he muſt *plead* to the *juriſdiction*, and cannot take advantage of it upon the *general iſſue*. Therefore by the law of *England*, if an action be brought againſt a judge of record for an act done by him in his judicial capacity, he may plead that he did it as judge of record, and that will be a complete juſtification. So in this caſe, if the injury complained of had been done by the defendant as a judge, though it aroſe in a foreign country where the technical diſtinction of a court of record does not exiſt, yet ſitting as a judge in a court of juſtice, ſubject to a ſuperior review, he would be within the reaſon of the rule which the law of *England* ſays ſhall be a juſtification; but then it muſt be pleaded. Here no ſuch matter is pleaded, nor is it even in evidence that he ſat as judge of a court of juſtice. Therefore I lay out of the caſe every thing relative to the *Arraval* of *St. Phillip*'s.

The firſt point then upon this ground is, the *ſacredneſs* of the defendant's perſon as *governor*. If it were true that the law makes him that ſacred character, he muſt plead it and ſet forth his commiſſion as ſpecial matter of juſtification; becauſe *primâ facie* the court has juriſdiction. But I will not reſt the anſwer upon that only. It has been inſiſted by way of diſtinction, that ſuppoſing an action will lie for an injury of this kind committed by one individual againſt another, in a country beyond the ſeas, but within the dominion of the crown of *England*, yet it ſhall *not emphatically* lie againſt the governor. In anſwer to which I ſay, that for many reaſons, if it did not lie againſt any other man, it ſhall *moſt emphatically* lie againſt the *governor*.

In every plea to the juriſdiction, you muſt ſtate another juriſdiction; therefore, if an action is brought here for a matter ariſing in *Wales*, to bar the remedy ſought in this court, you muſt ſhew the juriſdiction of the court of *Wales*; and in every caſe to repel the juriſdiction of the King's court, you muſt ſhew a more proper and more ſufficient juriſdiction: for if there is no other mode of trial, that alone will give the King's courts a juriſdiction. Now in this caſe no other juriſdiction is ſhewn, even ſo much as in argument. And if the King's courts of juſtice cannot hold plea in ſuch caſe, no other court can do it. For it is truly ſaid that a governor is in the nature of a viceroy; and therefore *locally, during his government*, no civil or criminal action will lie againſt

him: the reaſon is becauſe upon proceſs he would be ſubject to impriſonment. But here, the injury is ſaid to have happened in the *Arraval* of *St. Phillip*'s, where without his leave no juriſdiction can exiſt. If that be ſo, there can be no remedy whatſoever, if it is not in the King's courts: becauſe when he is out of the government, and is returned with his property into this country, there are not even his effects left in the iſland to be attached. 1774. MOSTYN *verſus* FABRIGAS.

Another very ſtrong reaſon, which was alluded to by Mr. Serjeant *Glynn*, would alone be deciſive; and it is this: that though the charge brought againſt him is for a *civil* injury, yet it is likewiſe of a *criminal* nature; becauſe it is in *abuſe* of the authority delegated to him by the *King's Letters Patent*, under the great ſeal. Now if every thing committed within a dominion is triable by the courts within that dominion, yet the effect or extent of the *King's Letters Patent*, which gave the authority, can only be tried in the King's courts; for no queſtion concerning the Seignory, can be tried within the Seignory itſelf. Therefore where the queſtion reſpecting the Seignory ariſes in the proprietary governments, or between two provinces of *America*, or in the Iſle of *Man*, it is cognizable by the King's courts in *England* only. In the caſe of the iſle of *Man* * it was ſo decided in the time of Queen *Elizabeth*, by the chief juſtice and many of the judges. So that *emphatically* the *governor* muſt be tried in *England*, to ſee whether he has exerciſed the authority delegated to him by the *Letters Patent* legally and properly; or whether he has abuſed it in violation of the laws of *England*, and the truſt ſo repoſed in him.

* 4 *Inſt.* 284.

It does not follow from hence, that let the cauſe of action ariſe where it may, a man is not entitled to make uſe of every juſtification his caſe will admit of, which ought to be a defence to him. If he has acted right according to the authority with which he is inveſted, he muſt lay it before the court by way of plea, and the court will exerciſe their judgment whether it is a ſufficient juſtification or not. In this caſe, if the juſtification had been proved, the court might have conſidered it as a ſufficient anſwer; and, if the nature of the caſe would have allowed of it, might have adjudged, that the raiſing a mutiny was a good ground for ſuch a ſummary proceeding. I can conceive caſes in time of war in which a governor would be juſtified, though he acted very arbitrarily, in which he could not be juſtified in time of peace. Suppoſe, during a ſiege or upon an invaſion

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invaſion of *Minorca*, the governor ſhould judge it proper to ſend an hundred of the inhabitants out of the iſland from motives of *real* and *genuine expediency*; or ſuppoſe upon a general ſuſpicion he ſhould take people up as ſpies; upon proper circumſtances laid before the court, it would be very fit to ſee whether he had acted as the governor of a garriſon ought, according to the circumſtances of the caſe. But it is objected, ſuppoſing the defendant to have acted as the *Spaniſh* governor was empowered to do before, how is it to be known here that by the laws and conſtitution of *Spain* he was authorized ſo to act. The way of knowing foreign laws is, by admitting them to be *proved* as *facts*, and the court muſt aſſiſt the jury in aſcertaining what the law is. For inſtance, if there is a *French* ſettlement the conſtruction of which depends upon the cuſtom of *Paris*, witneſſes muſt be received to explain what the cuſtom is; as evidence is received of cuſtoms in reſpect of trade. There is a caſe of the kind I have juſt ſtated *. So in the ſupreme reſort before the King in Council, the Privy Council determines all caſes that ariſe in the plantations, in *Gibraltar*, or *Minorca*, in *Jerſey*, or *Guernſey*; and they inform themſelves, by having the law ſtated to them.—As to ſuggeſtions with regard to the difficulty of bringing witneſſes, the court muſt take care that the defendant is not ſurpriſed, and that he has a fair opportunity of bringing his evidence, if it is a caſe proper in other reſpects for the juriſdiction of the court. There may be ſome caſes ariſing abroad, which may not be fit to be tried here; but that cannot be the caſe of a governor, injuring a man contrary to the duty of his office, and in violation of the truſt repoſed in him by the King's commiſſion.

Foreign laws muſt be proved as facts.

* *Feaubert v. Turſt*, Prec. Ch. 207.

If he wants the teſtimony of witneſſes whom he cannot compel to attend, the court may do what this court did in the caſe of a criminal proſecution of a woman who had received a penſion as an officer's widow: and it was charged in the indictment, that ſhe was never married to him. She alleged a marriage in *Scotland*, but that ſhe could not compel her witneſſes to come up, to give evidence. The court obliged the proſecutor to conſent that the witneſſes might be examined before any of the judges of the court of ſeſſion, or any of the barons of the court of exchequer in *Scotland*, and that the depoſitions ſo taken ſhould be read at the trial. And they declared, that they would have put off the trial of the indictment from time to time, for ever, unleſs

less the prosecutor had so consented. The witnesses were so examined before the Lord President of the court of session. 1774.

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It is a matter of course in aid of a trial at law, to apply to a court of equity, for a commission and injunction in the mean time; and where a real ground is laid, the court will take care that justice is done to the defendant as well as to the plaintiff. Therefore, in every light in which I see the subject, I am of opinion that the action holds *emphatically* against the *governor*, if it did not hold in the case of any other person. If so, he is accountable in this court or he is accountable no where; for the king in council has no jurisdiction. Complaints made to the King in council tend to remove the governor, or to take from him any commission, which he holds during the pleasure of the crown. But if he is in *England*, and holds nothing at the pleasure of the crown, they have no jurisdiction to make reparation, by giving damages, or to punish him in any shape for the injury committed. Therefore to lay down in an *English* court of justice such a monstrous proposition, as that a governor acting by virtue of letters patent under the great seal, is accountable only to God, and his own conscience; that he is absolutely despotic, and can spoil, plunder, and affect his Majesty's subjects, both in their liberty and property, with impunity, is a doctrine that cannot be maintained.

In Lord *Bellamont*'s case, 2 *Salk.* 625. cited by Mr. *Peckham*, a motion was made for a trial at bar, and granted, because the *Attorney General* was to defend it on the part of the King; which shews plainly that such an action existed. And in *Way* versus *Yally*, 6 *Mod.* 195. Justice *Powell* says, that an action of false imprisonment has been brought here against a governor of *Jamaica*, for an imprisonment there, and the laws of the country were given in evidence. The governor of *Jamaica* in that case never thought that he was not amenable. He defended himself, and possibly shewed, by the laws of the country, an act of the assembly which justified that imprisonment, and the court received it as they ought to do. For whatever is a justification in the place where the thing is done, ought to be a justification where the cause is tried.—I remember, early in my time, being counsel in an action brought by a carpenter in the train of artillery, against governor *Sabine*, who was governor of *Gibraltar*, and who had barely confirmed the sentence of a court-martial, by which the plaintiff had been tried, and sentenced to be whipped. The governor was very ably defended, but nobody ever thought that the action would not lie; and it being

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being proved at the trial, that the tradesmen who followed the train, were not liable to martial law; the court were of that opinion, and the jury accordingly found the defendant guilty of the trespass, as having had a share in the sentence; and gave 500 *l.* damages.

The next objection which has been made, is a general objection, with regard to the matter arising abroad; namely, that as the cause of action arose abroad, it cannot be tried here in *England*.

Where an action must be laid in the proper county.

There is a *formal* and a *substantial* distinction as to the *locality* of trials. I state them as different things: the *substantial* distinction is, where the proceeding is *in rem*, and where the effect of the judgment cannot be had, if it is laid in a wrong place. That is the case of all ejectments, where possession is to be delivered by the *sheriff* of the *county*; and as trials in *England* are in particular counties, the officers are county officers; therefore the judgment could not have effect, if the action was not laid in the proper county.

With regard to matters that arise *out* of the realm, there is a *substantial* distinction of locality too; for there are some cases that arise out of the realm, which ought not to be tried any where but in the country where they arise; as in the case alluded to, by Serjeant *Walker*: if two persons fight in *France*, and both happening casually to be here, one should bring an action of assault against the other, it might be a doubt whether such an action could be maintained here: because, though it is not a criminal prosecution, it must be laid to be against the peace of the King; but the breach of the peace is merely local, though the trespass against the person is transitory. Therefore, without giving any opinion, it might perhaps be triable only where both parties at the time were subjects. So if an action were brought relative to an estate in a foreign country, where the question was a matter of title only, and not of damages, there might be a solid distinction of locality.

But there is likewise a *formal* distinction, which arises from the mode of trial: for trials in *England* being by jury, and the kingdom being divided into counties, and each county considered as a separate district or principality, it is absolutely necessary that there should be some county where the action is brought in particular, that there may be a process to the sheriff of that county, to bring a jury from thence to try it. This matter of form goes to all cases that arise abroad: but the law makes a distinction between *transitory* actions and *local* actions. If the

matter

matter which is the cauſe of a tranſitory action ariſes within the realm, it may be laid in any county, the place is not material; and if an impriſonment in *Middleſex* it may be laid in *Surrey*, and though proved to be done in *Middleſex*, the place not being material, it does not at all prevent the plaintiff recovering damages: the place of tranſitory actions is never material, except where by particular acts of parliament it is made ſo; as in the caſe of churchwardens and conſtables, and other caſes which require the action to be brought in the county. The parties, upon ſufficient ground, have an opportunity of applying to the court in time to change the *venue*; but if they go to trial without it, that is no objection. So all actions of a tranſitory nature that ariſe abroad may be laid as happening in an *Engliſh* county. But there are occaſions which make it abſolutely neceſſary to ſtate in the declaration, that the cauſe of action really happened abroad; as in the caſe of ſpecialties, where the date muſt be ſet forth. If the declaration ſtates a ſpecialty to have been made at *Weſtminſter* in *Middleſex*, and upon producing the deed, it bears date at *Bengal*, the action is gone; becauſe it is ſuch a *variance* between the deed and the declaration as makes it appear to be a *different* inſtrument. There is ſome confuſion in the books upon the *ſtat. 6 Ric. 2.* But I do not put the objection upon that ſtatute. I reſt it ſingly upon this ground. If the true date or deſcription of the bond is not ſtated, it is a variance. But the law has in that caſe invented a fiction; and has ſaid, the party ſhall firſt ſet out the deſcription truly, and then give a *venue* only for form, and for the ſake of trial, by a *videlicet*, in the county of *Middleſex*, or any other county. But no judge ever thought that when the declaration ſaid in *Fort St. George*, *viz.* in *Cheapſide*, that the plaintiff meant it was in *Cheapſide*. It is a *fiction* of *form*; every country has its forms, which are invented for the furtherance of juſtice; and it is a certain rule, that a fiction of law ſhall never be contradicted ſo as to defeat the end for which it was invented, but for every other purpoſe it may be contradicted. Now the fiction invented in theſe caſes is barely for the mode of trial; to every other purpoſe, therefore, it ſhall be contradicted, but not for the purpoſe of ſaying the cauſe ſhall not be tried. So in the caſe that was long agitated and finally determined ſome years ago, upon a fiction of the *teſte* of writs taken out in the vacation, which bear date as of the laſt day of the term, it was held, that the fiction ſhall not be contradicted ſo as to invalidate the writ, by averring that it iſſued on a day in the vacation*; becauſe the fiction was invented for the furtherance

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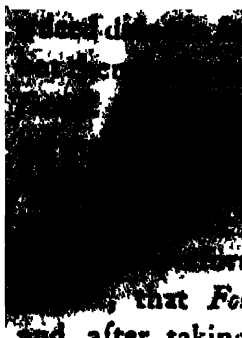
Moſes ux. verſus Farnham.

Fictions of law ſhall never be contradicted ſo as to defeat the end for which they were invented; but for every other purpoſe they may be contradicted.

* 2 *Burr.* 967.

at *Fort St. David's in the Eaſt Indies* at *London*, in ſuch a bond; upon demurrer the objection was, that the bond appeared to have been ſealed and delivered at *Fort St. David's* in the *Eaſt Indies*, and, therefore, the date made it local, and, by conſequence, the declaration ought to have been of a bond made at *Fort St. David's*, in the *Eaſt Indies*, *viz.* at *Iſlington*, in the county of *Middleſex*; or in ſuch a ward or pariſh in *London*, and of that opinion was the whole court. This is an inaccurate ſtate of the caſe. But in 2 Lord *Raym.* 1,042. it is more truly reported, and ſtated as follows: it appeared by the declaration, that the bond was made at *London* in the ward of *Cheap*; upon oyer, the bond was ſet out, and it appeared upon the face of it to be dated at *Fort St. George* in the *Eaſt Indies*; the defendant pleaded the variance in abatement, and the plaintiff demurred, and it was held bad: but the court ſaid that it would have been good, if laid at *Fort St. George*, in the *Eaſt Indies*, to wit, at *London*, in the ward of *Cheap*. The objection there was, that they had laid it falſely; for they had laid the bond as made at *London*; whereas, when the bond was produced, it appeared to be made at another place, which was a variance. A caſe was quoted from *Latch*, and a caſe from *Lutwyche*, on the former argument, but I will mention a caſe poſterior in point of time, where both thoſe caſes were cited, and no regard at all paid to them; and that is the caſe of *Parker* and *Crook*, 10 *Mod.* 255. It was an action of covenant upon a deed indented; it was objected to the declaration, that the defendant is ſaid in the declaration to continue at *Fort St. George*, in the *Eaſt Indies*; and upon the oyer of the deed it bore date at *Fort St. George*, and, therefore, the court, as was pretended, had no juriſdiction: *Latch, fol.* 4. *Lutwyche*, 950. Lord Chief Juſtice *Parker* ſaid, that an action will lie in *England* upon a deed



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parts; or elſe the party can have no remedy; a place in *England* muſt be alleged *pro* the deed, upon the oyer of it, muſt in theſe caſes, *proper* be as little as poſſible, it is not contract being of a voyage which from *Fort St. George* to *Great Britain*, does that *Fort St. George* is different from *Great Britain*; and after taking time to conſider of it in *Hilary* term, the plaintiff had his judgment, notwithſtanding the objection. Therefore the whole amounts to this; that where the action is ſubſtantially ſuch a one as the court can hold plea of, as the mode of trial is by jury, and as the jury muſt be called together by proceſs directed to the ſheriff of the county; matter of form is added to the fiction, to ſay it is in that county, and then the whole of the inquiry is, Whether it is an action that ought to be maintained. But can it be doubted, that actions may be maintained here, not only upon contracts, which follow the perſons, but for injuries done by ſubject to ſubject; eſpecially for injuries where the whole that is prayed is a reparation in damages, or ſatisfaction to be made by proceſs againſt the perſon or his effects, within the juriſdiction of the court? We know it is within every day's experience. I was embarraſſed a great while to find out whether the counſel for the plaintiff really meant to make a queſtion of it. In ſea batteries the plaintiff often lays the injury to have been done in *Middleſex*, and then proves it to be done a thouſand leagues diſtant on the other ſide of the *Atlantic*. There are caſes of offences on the high ſeas, where it is of neceſſity to lay in the declaration, that it was done upon the high ſeas; as the taking a ſhip. There is a caſe of that ſort occurs to my memory; the reaſon I remember it is, becauſe there was a queſtion about the juriſdiction. There likewiſe was an action of that kind before Lord Chief Juſtice *Lee*, and another before me, in which I quoted that determination, to ſhew, that when the Lords Commiſſioners of prizes have given judgment, that is concluſive in the action; and likewiſe when they have given judgment, it is concluſive as to the coſts, whether they have given coſts or not. It is neceſſary in ſuch actions to ſtate in the declaration, that the ſhip was taken, or ſeized *on the high ſeas videlicet*, in *Cheapſide*. But it cannot be ſeriouſly contended that the judge and jury who try the cauſe, fancy the ſhip is ſailing in *Cheapſide*: no, the plain ſenſe of it is, that as an action

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lies in *England* for the ſhip which was taken on the high ſeas, *Cheapſide* is named as a *venue*; which is ſaying no more, than that the party prays the action may be tried in *London*. But if a party were at liberty to offer reaſons of fact contrary to the truth of the caſe, there would be no end of the embarraſſment. At the laſt ſittings there were two actions brought by *Armenian* merchants, for aſſaults and treſpaſſes in the *Eaſt Indies*, and they are very ſtrong authorities. Serjeant *Glynn* ſaid, that the defendant Mr. *Vereliſt* was very ably aſſiſted: ſo he was, and by men who would have taken the objection, if they had thought it maintainable, and the actions came on to be tried after this caſe had been argued once; yet the counſel did not think it could be ſupported. Mr. *Vereliſt* would have been glad to make the objection; he would not have left it to a jury, if he could have ſtopped them ſhort, and ſaid, you ſhall not try the actions at all. I have had ſome actions before me, rather going further than theſe tranſitory actions; that is, going to caſes which in *England* would be local actions: I remember one, I think it was an action brought againſt Captain *Gambier*, who by order of Admiral *Boſcawen* had pulled down the houſes of ſome ſutlers who ſupplied the navy and ſailors with ſpirituous liquors; and whether the act was right or wrong, it was certainly done with a good intention on the part of the admiral, for the health of the ſailors was affected by frequenting them. They were pulled down: the captain was inattentive enough to bring the ſutler over in his own ſhip, who would never have got to *England* otherwiſe; and as ſoon as he came here he was adviſed that he ſhould bring an action againſt the captain. He brought his action, and one of the counts in the declaration was for pulling down the houſes. The objection was taken to the count for pulling down the houſes; and the caſe of *Skinner* and the *Eaſt-India* company was cited in ſupport of the objection. On the other ſide, they produced from a manuſcript note a caſe before Lord Chief Juſtice *Eyre*, where he over-ruled the objection; and I over-ruled the objection upon this principle, namely, that the reparation here was perſonal, and for damages, and that otherwiſe there would be a failure of juſtice; for it was upon the coaſt of *Nova-Scotia*, where there were no regular courts of judicature: but if there had been, Captain *Gambier* might never go there again; and, therefore, the reaſon of locality in ſuch an action in *England* did not hold. I quoted a caſe of an injury of that ſort in the *Eaſt Indies*, where even in a court of equity Lord *Hardwicke* had directed ſatisfaction to be made in damages: that caſe before

Lord

Lord *Hardwicke* was not much conteſted, but this caſe before me was fully and ſeriouſly argued, and a thouſand pounds damages given againſt captain *Gambier*. I do not quote this for the authority of my opinion, becauſe that opinion is very likely to be erroneous, but I quote it for this reaſon; a thouſand pounds damages and the coſts were a conſiderable ſum. As the captain had acted by the orders of Admiral *Boſcawen*, the repreſentatives of the admiral defended the cauſe, and paid the damages and coſts recovered. The caſe was favourable; for what the admiral did was certainly well intended; and yet there was no motion for a new trial.

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I recollect another cauſe that came on before me; which was the caſe of Admiral *Palliſer*. There the very giſt of the action was local: It was for deſtroying fiſhing huts upon the *Labrador* coaſt. After the treaty of *Paris*, the *Canadians* early in the ſeaſon erected huts for fiſhing; and by that means got an advantage, by beginning earlier, of the fiſhermen who came from *England*. It was a nice queſtion upon the right of the *Canadians*. However the admiral from general principles of policy ordered theſe huts to be deſtroyed. The cauſe went on a great way. The defendant would have ſtopped it ſhort at once, if he could have made ſuch an objection, but it was not made. There are no local courts among the *Eſquimaux Indians* upon that part of the *Labrador* coaſt; and therefore whatever any injury had been done there by any of the King's officers would have been altogether without redreſs, if the objection of locality would have held. The conſequence of that circumſtance ſhews, that where the reaſon fails, even in actions which in *England* would be local actions, yet it does not hold to places beyond the ſeas within the King's dominions. Admiral *Palliſer*'s caſe went off upon a propoſal of a reference, and ended by an award. But as to tranſitory actions, there is not a colour of doubt but that every action that is tranſitory may be laid in any county in *England*, though the matter ariſes beyond the ſeas; and when it is abſolutely neceſſary to lay the truth of the caſe in the declaration, there is a fiction of law to aſſiſt you, and you ſhall not make uſe of the truth of the caſe againſt that fiction, but you may make uſe of it to every other purpoſe. I am clearly of opinion not only againſt the objections made, but that there does not appear a queſtion upon which the objections could ariſe.

The three other judges concurred.

*Per Cur.* Judgment affirmed.

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Friday, Nov. 18th.

A poſt-maſter is bound to deliver all letters to the ſeveral inhabitants *within a poſt town or place* at their reſpective *places of abode*, at the rate of poſtage *only* as eſtabliſhed by act of parliament.

## SMITH *verſus* POWDICH.

THIS was an action for money had and received: Plea *non aſſumpſit*, and iſſue thereupon. At the trial the jury found a ſpecial verdict; the material facts of which were as follow: That the plaintiff *Smith* was an inhabitant of the town of *Hungerford*, and his place of reſidence well known to the defendant *Powdich*. That *Powdich* was deputy poſt-maſter for the town of *Hungerford* under the appointment of the poſt-maſter general: that before and from the making the *ſtat.* 9th *Anne*, for regulating the poſtage of letters, the deputy poſt-maſter had been uſed to receive *one penny* over and *above* the uſual *rate* of *poſtage* from every inhabitant of the ſaid town, for every letter directed and *delivered* to the ſaid inhabitants *at* their reſpective *places* of *abode*, or a recompence by the year, or proportionably for a leſs time in lieu thereof; except when any inhabitant has refuſed to pay the recompence for his delivery at the place of abode, in which caſe the poſt-maſter for the time being hath kept at the ſaid poſt-office, ready to be delivered when called for, the letters of every ſuch inhabitant ſo refuſing as aforeſaid; and except in the inſtance of *one* family in the ſaid town, who refuſed to pay the additional penny above the rate of poſtage fixed by act of parliament, and to whom letters were for five years afterwards delivered at their place of abode for the legal rate of poſtage only; which family at the end of ſuch five years, the poſt-maſter being changed, paid the additional penny. That on 3d *Jan.* 1774, the plaintiff gave notice to the defendant that he would not pay more than the rate of poſtage fixed by act of parliament for any letter brought to the ſaid office for him, and if the defendant did not deliver ſuch letter at the place of abode of the ſaid plaintiff, or received any ſum above ſuch rate of poſtage, he would commence an action againſt him. That on the 5th *Jan.* 1774 the defendant *Powdich* carried a letter directed to the plaintiff at his place of abode in *Hungerford*, but *refuſed* to *deliver* it unleſs the plaintiff would pay an additional penny over and above the poſtage, but was willing to deliver it at the poſt-office for the poſtage only; that after tender by the plaintiff of the poſtage only, and a refuſal by the defendant, he ſubmitted to pay the additional penny. The jury further found that this *demand* if *legal* was a *reaſonable* demand; but whether it was ſo or not they prayed the opinion of the court.

Mr.

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Mr. *Buller* for the plaintiff. The queſtion ſubmitted upon this record for the opinion of the court is, Whether the deputy poſt-maſter of *Hungerford* is bound to deliver letters to the ſeveral inhabitants of *Hungerford*, to whom they are directed, at their reſpective places of abode, at the ſeveral rates of poſtage eſtabliſhed by act of parliament; or whether he may at his option demand and take any thing more?

This queſtion depends upon the conſtruction of the ſeveral acts of parliament relative to the poſtage of letters, and not on any uſage of a particular place, for no uſage can operate contrary to the expreſs proviſions of an act of parliament. The ſeveral ſtatutes 9 *Ann. c.* 10. 4th *Geo.* 2. *c.* 33. 5 *Geo.* 3. *c.* 25. expreſsly provide for the *delivery* as well as the *conveyance* of letters; and it was neceſſary they ſhould do ſo, on account of the great inconvenience and almoſt impracticability of every perſon fetching their own letters. In *ſtat.* 9 *Ann. c.* 10. *ſect.* 39. it is provided that after the 1ſt of *June* 1743 the old rates ſhould be revived and paid, for the carriage, conveyance, and *delivery* of all letters, *&c.* By the 4 *Geo.* 2. *c.* 33. made for the purpoſe of obviating a doubt concerning the allowance made, upon the delivery of letters ſent by the penny-poſt office beyond the limits then allowed by act of parliament; it is enacted that ſuch allowance of a penny may be legally taken upon the delivery of every letter, originally ſent by the penny-poſt, and not firſt paſſing by the general poſt, and from thence tranſmitted to the penny-poſt; over and above the penny upon putting ſuch letter into the penny-poſt. The exception in this act, of letters ſent by the general poſt, ſhews clearly, that no allowance whatever is to be added to the rate of poſtage on account of delivery.

The *ſtat.* 9 *Ann. c.* 10. *ſ.* 16. provides an additional allowance of a penny for letters delivered from on ſhip-board to the poſt-office: that clauſe therefore is negatively a declaration that it ſhall not be taken in any other caſe.

Again, the *ſtat.* 5 *G.* 3. *c.* 25. *ſect.* 4. ſpeaks of the *limits* of *delivery*; and directs that a *penny extra* ſhall be paid for all ſhip letters directed to places within the limits of the delivery of letters by the deputy poſt-maſter. There can be no doubt therefore under theſe acts but that the poſt-maſter is bound to deliver the letters; but the queſtion made by the defendant is, Whether he is bound to deliver them to the ſeveral inhabitants *within the poſt-town* at their reſpective *houſes*, or only at the poſt-office appointed for the reception of the mail? It is clear it muſt

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mean a *delivery* at the reſpective *houſes* within the town, becauſe the inconvenience would be ſo great as to render it next to impoſſible that every body ſhould fetch their own letters.

Next as to authorities: The caſe of *Barnes* v. *Foley*, *Hil.* 8 *Geo.* 3. 1768. *R. B.* has decided that the poſt-maſter cannot demand or receive any thing for the delivery of letters within the poſt-town, beyond the legal rate of poſtage. In *Stock* v. *Harris*, *Eaſt.* 11 *G.* 3. *R. B.* it was adjudged that the poſt-maſter was entitled to nothing more for the delivery of a letter than the uſual rate of poſtage.

* Since reported in a *Blackſt.* Rep. 906.

But in *Rowning* v. *Goodchild*, *Trin.* 13 *Geo.* 3. *C. B.** the general queſtion came before the court, and is deciſive in favour of the plaintiff in this caſe. It was an action againſt the deputy poſt-maſter of *Ipſwich* for not delivering the plaintiff's letters at his place of abode at *Ipſwich*, but on the contrary detaining them, *&c.* Upon not guilty pleaded, the jury found a verdict for the plaintiff, ſubject to the opinion of the court on a caſe ſtated. The queſtion was, Whether the defendant was obliged to deliver the letters to the inhabitants of *Ipſwich* at their places of abode. Lord Chief Juſtice *de Grey* delivered the opinion of the court.

This queſtion depends upon the conſtruction of the *ſtat.* 9 *Ann. c.* 10. and the only conſideration is, What is meant by the word *delivery?* That is, Whether the poſt-maſter is obliged to deliver the letters to the inhabitants at their reſpective places of abode; or, Whether it is ſufficient if the letters are delivered to them at the poſt-office. By *ſect.* 2. it appears that the duty of the poſt-maſter conſiſts in three articles, namely, receiving, carrying, and delivering letters; by the ſame *ſect.* he is empowered to fix as many ſtages as he thinks fit for that purpoſe. Therefore as the term carrying implies a place and perſon to whom they are to be carried, the term delivering implies a place and perſon to whom they are to be delivered. But the mere quitting of the cuſtody of a letter does not anſwer the idea of the word delivery, nor indeed can the poſt-maſter general, by ſending a letter from his office in *London* to his office at *Ipſwich*, be ſaid to quit the poſſeſſion, it is only a continuation of the cuſtody of it. His Lordſhip compared this 2d *ſect.* with *ſect.* 40. which provides againſt the detaining any letter: with *ſect.* 39. where the delivery as well as the conveyance is named in fixing the poſtage: with *ſect.* 30. which gives a ſummary juriſdiction in caſe of any perſon to whom a letter is delivered refuſing to pay the poſtage: and he likewiſe

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SMITH *verſus* POWNICE.

likewiſe cited the *ſtat.* 5 *G.* 3. *c.* 25. *ſtat.* 4 *G.* 2. *c.* 33. and concluded that from a compariſon of all the acts on the ſubject which were uniform and conſiſtent with each other, it was clear the legiſlature meant by delivery, a delivery to the perſon at his place of abode. That the uſage in *London*, and other great commercial towns, as *York* and *Briſtol*, was agreeable to this conſtruction, and that the ſame rule muſt take place throughout the kingdom. The caſe therefore of *Rowning* v. *Goodchild* is deciſive of the queſtion. But there are two particular facts found by this ſpecial verdict which are material. 1ſt. That the poſt-maſter acquieſced in delivering letters to one family, at the legal rate of poſtage, for five years. 2dly, That the poſt-maſter demanded this additional penny, which in the caſe of *Barnes* v. *Foley* it was ſettled he had no right to do; for he cannot impoſe a general tax.

Mr. *Manſfield* for the defendant. With reſpect to the laſt objection, if it were to prevail, it would evade the greater queſtion intended to be decided by this ſpecial verdict, which is framed ſo as to take the ſenſe of the court upon the general queſtion: and as to the acquieſcence of the poſt-maſter in the particular caſe mentioned, it is found that every other perſon except that particular family has been content to pay the additional penny from the firſt eſtabliſhment of the poſt at *Hungerford* to the preſent time. It is further found that this extraordinary payment is a reaſonable ſum for the labour of the poſt-maſter in delivering letters at the houſes of the reſpective inhabitants, unleſs he is bound to deliver them at the legal rate of poſtage only.

The legality of this payment turns upon theſe two grounds. 1ſt. That ſomething is underſtood under the word "*delivery*;" and 2dly, That there is no prohibition againſt taking a conſideration for the delivery of letters in poſt towns.

*Firſt*, as to the limits of delivery, it is plain from the words of the *ſtat.* 5 *G.* 3. *c.* 25. *ſect.* 4. that limits of delivery mean the whole of a particular diſtrict adjacent to a poſt-town, at which poſt-town letters for the inhabitants of ſuch diſtrict are directed to be left. If that be the true conſtruction, even the *Orkneys* are within the limits of delivery. Every place in *England* is within the limits of ſome delivery or other; therefore no argument to ſhew that delivery means a delivery at the place of abode can be drawn from the expreſſion "limits of delivery." But the words may be as well ſatisfied by a delivery at the poſt-office. If not, the whole revenue would not ſuffice for the expence of

delivery

1774. delivery at the reſpective place of abode of every inhabitant within each particular diſtrict.

Brown verſus Powlett. *Secondly*, There is no prohibition againſt taking a conſideration above the legal rate of poſtage for the delivery of letters in poſt-towns.

The prohibitory clauſe in the *ſtat.* 9 *Ann. c.* 10. *ſect.* 27. has in view only the general carriage of letters upon poſt-roads, not within poſt-towns, otherwiſe the argument would be as ſtrong to oblige the poſt-maſter to fetch letters to the poſt-office, as to deliver them at each perſon's houſe, for it equally reſtrains perſons from carrying letters to the poſt-office, as from it.

It appears by the journals of the Houſe of Commons, that a clauſe which was inſerted to prohibit the taking more than the legal poſtage in poſt-towns was rejected.

The *ſtat.* 9 *Ann. c.* 10. *ſect.* 5. which fixes the ſeveral rates of poſtage, does not mention the word delivery, but only poſtage and conveyance, therefore it only means carrying from ſtage to ſtage, not from one part of the town to another.

As to *ſect.* 40. againſt opening or detaining any letter except for want of a true direction, or where the party cannot be found, the legiſlature could never mean to oblige the poſt-maſter to inquire at every houſe in a village or diſtrict before he returned the letter, but only that he ſhould not wilfully delay or embezzle it.

With reſpect to the penny allowed by the *ſtat.* 5 *G.* 3. *c.* 25. *ſect.* 4. for the delivery of letters coming from on board a ſhip, this proviſion was only to ſupply the loſs of dead letters never inquired after. And therefore does not afford the negative inference contended for.

The uſage throughout the kingdom is greatly in favour of the preſent claim; for out of 357 poſt-towns 281 have conſtantly paid a compenſation for the delivery of letters, and the complete anſwer to the inconvenience of people attending to fetch their own letters is, that it is chimerical and viſionary, for it never has, and never will happen.

Lord *Mansfield*. What anſwer do you give to the caſe of *Rowning* v. *Goodchild*?

Mr. *Mansfield*. The judgment in that caſe was given upon the particular ſtate and circumſtances of it; and the court thought that the poſt-maſter could not vary the uſage after the year 1741, which had been practiſed before the year 1741: but they did

not

not decide that in all cases the post-master was obliged to deliver out letters at the places of abode in the town. 1775.

Lord MANSFIELD.—That case is an authority precisely upon the general point: but as it came before the court upon a special case, if the parties at the post-office were desirous to have a special verdict to litigate that opinion, it would not preclude them from bringing the question before this court. I am surprised that on a point of this kind, where either way there may be great inconveniences, where the acts of parliament are doubtful, and where the usage of places is contrary, the post-office does not apply to parliament to settle this matter. Therefore, we avoided the general question in the cases of *Bath* * and *Gloucester* *, determined in this court; and in both those cases there was a right ground for our not going into the general question; which was this, that there the post-master demanded the additional charge as a *duty*; and it would be extraordinary, if parliament meant a duty should be raised at every post-town, that they did not fix it themselves, instead of leaving it in the breast of the post-master. Another reason why we wished to leave it open for the interference of parliament, was the unanswerable inconvenience of every body going to the post-office for their letters, on the one side, and on the other, the burthen to the post-master in not being allowed to deliver them to any person for gain.

Sittings *after* Term. Post-office.

* *Barnes* v. *Foley.*
* *Stock* v. *Harris.*

But that struck me in the *Gloucester* * cause, which I thought the true construction; namely, that there is a distinction between the place where the post-master ought to have the burthen thrown on him, and one beyond which he ought not to have it. I am convinced that the stress which has been laid in the argument of to-day on the opinion of the *C. B.* respecting the 4th *sect.* 5 *Geo.* 3. and which explains delivery to mean delivery at every body's place of abode within the limits of delivery, means all the district within a post-town; just as if you asked a man where he lived, and what was his post-town.

* *Stock* v. *Harris.*

There is, however, a section in *stat.* 9 *Ann. c.* 10. *sect.* 22. which seems to mark the reasonable line, beyond which the post master is not obliged, but within which he is obliged to deliver letters; the words of the section are as follow; "pro-
"vided always and be it further enacted, that nothing herein
"contained shall be understood to prohibit the carrying or re-
"carrying of any letters or packets, to or from any town or
"place, to or from the next respective post-road or stage ap-
"pointed for that purpose, above six miles from the said general
"post-

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"poſt-office, or the chief offices of *Edinburgh* and *Dublin*; but "that every perſon ſhall have free liberty to ſend and employ "ſuch perſon or perſons as they ſhall think fit, to carry the ſaid "letters or packets, as aforeſaid, without any forfeiture or "penalty therefore; any thing herein contained to the contrary "notwithſtanding."

Now there is no general poſt that goes within 7 or 8 miles of *London*; nevertheleſs the poſt-maſter has always delivered letters within *London* and the contiguous buildings at the eſtabliſhed rate of poſtage: But he never delivered them at *Putney*; that is a ſtrong proof, coeval with the 1ſt ſtatute which eſtabliſhed a rate of poſtage, that there are boundaries. And this ſection lays a foundation for me to ſay, that there is ſuch a line. The legiſlature forbids all letters to be carried by any other perſons under certain circumſtances and reſtrictions; but it appeared neceſſary, if a place was four or five miles diſtant from a poſt-town or ſtage, that letters ſhould be carried, and the perſons carrying them paid for it. And I lay ſtreſs on the term *any town or place*. It ſays "*Town* or *place*;" becauſe there are ſome ſtages where there is but a ſingle houſe, as *Hartfordbridge*; but the town is conſidered as one ſpot, and the whole of it is taken as *terminus ad quem*. In the *Gloceſter* caſe, *Stock* v. *Harris*, *Hil.* 11 *G.* 3, *R. B.* the court conſidered the city of *Gloceſter* as the poſt-town or place, in oppoſition to limits out of the town; and on that foundation it was held that the poſt-maſter had no right to vary the former uſage. *Vide* this caſe ſince reported 5 *Burr.* 2,709.

In the preſent caſe, the poſt-office contends, that *in* the *town* there is no houſe that ſhall not pay an additional ſum for the delivery; which is in the higheſt degree unreaſonable, if there is a diſtinction, which the poſt-office itſelf ſeems to have made, as in *London*; *viz.* in reſpect to places contiguous to it. The poſt-town or place is certainly a boundary within which the poſt-maſter is obliged to deliver letters at the rate of poſtage as eſtabliſhed by act of parliament: and here the plaintiff's houſe is *within* the poſt-town. But in this caſe alſo the defendant has *demanded* the additional charge, as a *duty*, which he has no right to do whatever: So that we might get clear of it upon that ground, as we did in the *Bath* caſe. But we do not avoid the general queſtion: on the contrary, our deciſion is expreſsly upon the general queſtion. If the queſtion is made with a view to controvert the judgment in the Common Pleas, we will defer our opinion to a

ſecond

second argument. My distinction does not go to the sending a letter two or three miles out of town. 1774.

Smith on the Postmaster Postmaster.

Aston Justice. In *Stock* v. *Harris*, the *Glocester* case, the court decided that the post-master was obliged to *deliver* letters to all persons *in the post town* at the legal rate of postage *only*. The case of *Rowning* v. *Goodchild*, in *C. B.* is a decision upon the general question. A single post-house not in a town might possibly afford a question. But this is a post-town, and I am clearly of opinion, that the post-master is bound to deliver all letters within the post-town. If it is necessary to lay any additional charge, there ought to be an application to parliament for the purpose. The post-master cannot impose any sum: I am very well satisfied he has no such right: and with respect to inconvenience, it would be of infinite and general inconvenience to the public at large, if they were obliged to fetch their letters from the post-office; whereas this is only a private and particular inconvenience to the post-master.

Willes Justice. I am most clearly of the same opinion. The usage in *London* and other great towns has been, to deliver all letters at the houses of the respective inhabitants to whom they are directed. In smaller post-towns the post-master has declined to do so without an additional allowance: probably because there were only a few persons to dispute the right. I think a post-town is different from what the case of a single post-house might be.

The *Bath* case was exactly this case. The defendant demanded the additional sum; and it was there clearly held he had no right to make such demand. So here it is *demanded*. The case of *Glocester* was decided upon the usage; those two cases, therefore, did not decide the general question: but the case of *Rowning* v. *Goodchild* *, *C. B.* did. And, therefore, I am of opinion upon both grounds, namely, upon the general ground, and likewise upon its being a demand, that judgment should be given for the plaintiff.

* 2 *Black.* Rep. 906.

Ashhurst Justice. I am of the same opinion.

Postea delivered to the plaintiff.

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## Doe on the demise of Bayntun *versus* Watton, and another.

Same day.

In ejectment, upon not guilty pleaded, the jury found a verdict for the plaintiff, subject to the opinion of the court upon the following case.

That *Jane Bayntun*, being seised in fee of the premises in the declaration mentioned, by her will bearing date *Sept.* 30, 1745.

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1745, duly executed, gave and deviſed the ſame to her nephew *Stucley Bayntun* for life, with remainder to his firſt and other ſons in tail male, and the iſſue male of the body of ſuch ſons, and in default of ſuch iſſue to her nephew *Henry Bayntun* in like manner, with remainder to her nephew *William Bayntun* the leſſor of the plaintiff in like manner. In which will was contained the following power: "I do hereby declare, elect, and "appoint, and my will and mind is that it ſhall and may be "lawful to and for the ſaid *Stucley Bayntun*, *Henry Bayntun* and "*William Bayntun*, and for each and every of them, at any "time or times, when they ſhall come into the actual poſſeſſion "of the ſaid manors, capital meſſuages, and premiſes hereby "by me given to them as aforeſaid, by any writing or writings "to be ſubſcribed and ſealed by any or either of them, when "poſſeſſed of the ſaid premiſes as aforeſaid, in the preſence of "three witneſſes, at the leaſt, to demiſe, leaſe, or grant the "ſaid premiſes, to each of them hereby granted as aforeſaid, to "any perſon or perſons whatſoever, for the term of one and "twenty years, or under, or for any number or term of years "determinable upon one, two, or three lives, *in poſſeſſion*, and "*not in reverſion*."

That the ſaid *Jane Bayntun* died ſeiſed of the ſaid premiſes; on whoſe death the ſaid *Stucley Bayntun* entered, and in his life time the ſaid *Henry Bayntun* died without iſſue.

That the ſaid *Stucley Bayntun* on *Jan.* 21ſt 1772, by indenture made and duly executed between the ſaid *Stucley Bayntun* of the one part, and *Anne Surman* of *Chadlington* of the other part, did demiſe all and ſingular the ſaid premiſes in the ſaid ejectment mentioned, to the ſaid *Anne Surman*, to hold unto the ſaid *Anne Surman*, her executors, adminiſtrators, and aſſigns, *from the day of the date* thereof, for and during and unto the full end and term of fourſcore and nineteen years, from thence next enſuing, and fully to be complete and ended, if ſhe the ſaid *Anne Surman*, *Sarah Newman*, and *Edward Newman*, ſon and daughter of *Hannah Newman* of *Chadlington* aforeſaid, any or either of them, ſhould ſo long happen to live, &c.

That the ſaid *Stucley Bayntun* died without iſſue.

The queſtion was, Whether upon the whole of this caſe the plaintiff had a right and title to recover?

Mr. *Howorth* for the plaintiff objected, that this leaſe being made to commence *from the day of the date*, was a leaſe in *reverſion* and not in *poſſeſſion*; and therefore not purſuant to the power.

Mr.

Mr. *Baldwin* for the defendant acknowledged there were a great many authorities against him, in cases of *freehold* demises, but none in the case of a lease under a *power* given. On the contrary, he insisted, that the execution of powers have always been construed most liberally in favour of the party for whose benefit they are intended: and cited *Tollett* versus *Tollet*, 2 *P. Wms.* 489. where *Baron* having a power to make a jointure by *deed*, did it by *will*, and the court held it a good execution of the power notwithstanding. 1784. Doe versus Watton.

With respect to the lease being a lease in reversion, as being to commence *from the day of the date*, he cited the case of *Luellen* versus *Morgan*, cited in 3 *Bulstrode*, 203. *Bacon* versus *Waller*; in which first case it was held, that a lease made *habendum a datu* and *a die datûs*, was all one.

In 2 *Salk.* 413. 1 Lord *Raym.* 84. *S. C.* it is laid down that a lease to commence *a datu*, *includes* the day of the date.

And in 2 *Wilson* 165. *Freeman* on demise of *Vernon* versus *West*, the court decided, that a lease for lives to begin from the day of the date, and seisin delivered afterwards, is good, and shall not be said to convey a freehold to commence *in futuro*: and in a note at the end of the report, it is added, that Mr. Justice *Wilmot*, at a former trial in ejectment upon this same lease, was of opinion, that from the date and from the day of the date, was the very same, and both included the day.

Ashhurst Justice. Mr. Justice *Wilmot* in that case left it to the jury to say, whether they would not presume that livery of *seisin* was made subsequent to the lease.

Mr. *Howorth*. The distinction that universally prevails through all the cases is, that a lease to commence from the date includes the day, but a lease to commence from the day of the date, as in the present case, excludes the day of the lease made: and the case of the Countess of *Portland*, in the *Exchequer*, is in point. It was argued four times and finally adjudged. The case cited from *Wilson* must be a mistake.

Lord Mansfield. I think it must be so, and the other authorities are, I am afraid, too strong to get over. At the same time I am sorry that there ever existed a determination, which avoided a fair lease, by construing from the day of the date, to exclude the day of the date; because it may be taken either way. It would have been a very right principle of law to have said, if the one construction will render the lease good, and the other

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will make it void, the conſtruction which makes the leaſe good ſhall prevail; becauſe it muſt manifeſtly have been the intention of all parties, that the leaſe ſhould be a valid and effectual leaſe.

I applaud Lord Chief Juſtice *Wilmot*, for leaving it to the jury, to preſume livery of *ſeiſin* the laſt moment of the day, and if this caſe could be determined that way, I certainly ſhould wiſh for it; but it cannot. If you think you can find a contrariety of authorities, I ſhould be glad to lay hold of it, and ſhould be glad to bring the matter back to common ſenſe and the cleareſt principles of juſtice: adding the word *excluſive*, or *incluſive*, would be deciſive. Then it is a queſtion of conſtruction which word ſhould be implied.

ASTON Juſtice. I think it a very hard caſe; but the authorities are too many to be got over. The caſe in *Wilſon* muſt be a miſtake.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* concurred.

Judgment for the Leſſor of the Plaintiff.

Vide poſt. *Doe ex dim. Pugh* verſus Duke of *Leeds*, *infra*, 724. a very elaborate opinion of the court, in which it was held, that *from the date* and *from the day of the date* may both *include* the day of the date.

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*Same day.*

## SCHULDAM *verſus* BUNNISS and another.

Perſons empowered by ſtat. 3 Geo. 3. c. 15. to inſpect the entries of freemen, have a right to inſpect ALL *books*, papers, *&c.* in which the admiſſions of freemen are entered. And where there are *two* or more *Bailiffs*, *&c.* of a Borough or Corporation, a *joint* action will lie, if they refuſe inſpection, though the words of the ſtatute are in the ſingular number, *mayor*, *bailiff*, *&c.*

IN debt for five penalties upon the *Stat.* 3 *G.* 3. *c.* 15. the declaration conſiſted of five counts.

At the trial a verdict was given for the defendants, upon the ſecond count, and for the plaintiff upon all the other counts, ſubject to the opinion of the court, on the following caſe.

"That the borough of *Aldeburgh* ſends members to parliament; that the freemen of the borough become ſuch, either "from a ſervitude of ſeven years apprenticeſhip, or by election; "that the right of electing freemen is in the capital burgeſſes "by act of court, in their corporate aſſemblies, conſiſting of a "certain number of the members of the borough of certain "denominations."

"That there is an *aſſembly book*, in which the election of "officers, the nomination and *admiſſion* of freemen, and all other "acts of court are entered; which book is kept in a cheſt, under "two locks and keys, and is in the cuſtody of the bailiffs of the "borough. That the entries of admiſſions of freemen in this

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SCHUL-DAM *verſus* BUNNIES.

book expreſs them as being *duly elected*, or as taking by *ſervitude*: but almoſt all the freemen are now *honorary* freemen. That for about eight years laſt paſt, the admiſſions of freemen have not been entered in this book; and the town clerk ſaid, they were ſo omitted by direction; but that ſuch direction was not the order of the court.

That there is likewiſe a *ſtampt book*, made and kept by the town clerk, in which the admiſſions of freemen are entered, with the times of their admiſſion; but it does not contain the names and characters of the perſons conſtituting the courts at which the admiſſions were made. That in this book the title to the freedom is not in general ſet out, but there are a few inſtances in which the freemen are ſaid to have been *elected*, and in one or two to have taken up their freedom by *ſervitude*.

That there is likewiſe a copy or duplicate of this book which is kept by the bailiffs.

The town clerk alſo ſaid, that ſince the entry of the admiſſions in the *aſſembly book* had been diſcontinued, he had ſometimes taken a minute of the admiſſions on looſe papers; but that he did not file them or preſerve them in any order, but ſometimes carried them home to his houſe at *Ipſwich*, and ſometimes left them looſe in the *aſſembly book*.

The town clerk likewiſe ſaid, that a diſhoneſt man in his office had it in his power, if he was ſo diſpoſed, to enter fictitious freemen in the *ſtampt book*.

That in *May* 1773, there was an election for one member of parliament; when Mr. *Fonnereau* and the aforeſaid Mr. *Long* were candidates; and there having been a large creation of freemen lately made, by the intereſt of Mr. *Fonnereau*, Mr. *Long* was deſirous of ſeeing whether they were made conſtitutionally; and therefore cauſed the ſeveral demands ſtated in the declaration for the inſpection of the *aſſembly book*, to be duly made, according to the direction of the ſtat. 3 *Geo.* 3. But the defendants refuſed to produce it, or to permit ſuch inſpection; referring the parties demanding the ſame, to the *ſtampt book*, in the hands of the town clerk (of which Mr. *Long* had had a copy before, and in which the late creation was inſerted), or offered to produce the duplicate in their cuſtody, for inſpection.

One of the preſent bailiffs at the trial, though ſubpœnaed for that purpoſe with a *ſubpœna duces tecum*, refuſed to produce the ſaid book at the trial.

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SERJEANT DAM *verſus* BUNNISS.

The defendants called no witneſſes; but inſiſted that by the meaning of the *ſtat.* 3 *Geo.* 3. *c.* 15. they had not incurred any penalty by not producing or permitting an inſpection of the aſſembly book. The queſtion was, Whether under the circumſtances of this caſe, the defendants were obliged to produce the aſſembly book within the meaning of the *ſtat.* 3 *Geo.* 3. *c.* 15.

This caſe was argued twice. 1ſt, In this term, by Mr. *Cole* for the plaintiff, and Serjeant *Sayer* for the defendants. Afterwards in *Hilary* term, by Serjeant *Foſter* for the plaintiff, and Mr. *Dunning* for the defendants.

The objections were two; 1ſt, That the ſtampt book was the only book within the meaning of the *ſtat.* 3 *Geo.* 3. 2dly, That the action which was *joint*, ought to have been brought againſt the defendants *ſeparately*.

Serjeant *Sayer* for the defendants. The 1ſt queſtion is, What ſort of inſpection the *ſtat.* 3 *Geo.* 3. *c.* 15. meant to give? And clearly, it meant to give no other than was ſufficient to anſwer the end of the ſtatute; the ſole object of which is, to prevent occaſional freemen from voting at elections: theſe the act deſcribes to be, ſuch perſons as have not been admitted to their freedom twelve calendar months before the election; and to enable the parties to know who are within that deſcription, it provides, "that the mayor, &c. ſhall, upon demand of any candidate, his agent, or two freemen, permit ſuch candidate, &c. "to inſpect the *books* and *papers*, wherein the admiſſion of freemen "ſhall be entered, &c." But the legiſlature by uſing the words *books* and *papers*, could never intend that a party ſhould inſpect all the books and papers of a corporation for a century back, or any other unlimited time; but only ſuch as contain any entry of freemen admitted as recently as the laſt twelve months. If ſo, the aſſembly book (the ſuppreſſion of which is imputed to the defendants) is not within the purview of the act; for it is in evidence, that no admiſſion whatever had been entered in the aſſembly books for the laſt eight years; that the ſtampt book was the only book in which any entry had been made during that time; conſequently it was the only book which could afford any information on the ſubject of occaſional freemen; and therefore the only one which the parties had a right to inſpect.

2dly, This action ought to have been brought againſt the defendants *ſeparately*; for the words of the ſtatute are, "*mayor*, "*bailiff*," &c. which ſhews, it ought to be brought againſt *every* bailiff, &c. offending, in the *ſingular* number; and if the

defendants

defendants might be joined, the ſtatute would be evaded by leſſening the penalty which the party has no right to. Therefore the action is ill brought. 1774. SCHUL-DAM *verſus* BUNNISS.

The court ſeemed clear for the plaintiff upon the firſt objection. But thinking the verdict which was taken for five penalties hard and unreaſonable, inclined to liſten to the ſecond, and therefore ordered it to ſtand over for another argument upon this latter objection only.

Upon the ſecond argument Serjeant *Foſter* for the plaintiff: 1ſt, as to the verdict being oppreſſive, the ſtatute meant to give repeated penalties for repeated offences; otherwiſe if a ſingle penalty only could be recovered, the object of the legiſlature would be entirely fruſtrated; becauſe it would well anſwer the purpoſe of a candidate to indemnify the officer for refuſing.

With reſpect to the action being ill brought, becauſe jointly againſt both bailiffs, their *office* is but *one*, and *both* make but *one* officer; therefore the action is well brought againſt them jointly. 11 *Rep.* 2. Auditor *Curle*'s caſe. 1 *Show.* 289. 2 *Mod.* 23. 3 *Lev* 399. *Carth.* 145. *Cro. El.* 625. 8 *Mod.* 303. *Salter* v. *Groſvenor*.

Lord *Mansfield* being called away to the Exchequer chamber, recommended it to *Foſter* to conſult his client *how many penalties* he would inſiſt upon. On Lord *Mansfield*'s return, *Foſter* declared he would be content to take *one only*; whereupon Lord *Mansfield* called upon the counſel for the other ſide to go on.

Mr. *Dunning contra*. The object of this act of parliament is to make the parties offending pay the penalties, and not a perſon who never offended at all. The queſtion is, Whether this action is rightly conceived, which ſuppoſes the bailiffs to have committed a partnerſhip offence, and therefore to be both liable.

With regard to the caſes cited, they all fall within this rule of diſtinction: that where the offence is in the nature of a *treſpaſs*, there it is equally competent to the party injured to bring a *joint* or *ſeparate* action. But where it is an act of *omiſſion*, as in this caſe, the omiſſion of the *one* cannot be conſidered as the omiſſion of the *other*.

Suppoſing a diſtinct refuſal had been proved, it was competent to the party aggrieved to have recovered againſt the bailiff obſtructing, but not againſt the other. Therefore the action ought to have been brought ſeparately againſt each of them.

Lord *Mansfield*. By the act of parliament to prevent occaſional votes, it is provided, that where the right of election is in

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freemen, none ſhall vote unleſs they ſhall have been admitted to their freedom twelve calendar months previous to the election; with an exception however as to all thoſe, who are made freemen upon the foundation of inchoate rights; as by birth, marriage, or ſervitude. In this act there is a clauſe, upon which the preſent action is brought. I will read it.

"And be it further enacted by the authority aforeſaid, that "the may*or*,* bail*iff*, ſher*iff*, town-cl*erk*, or other offic*er* of any "corporation, having the cuſtody of, or power over the records "of the ſame, &c."

You obſerve from my manner of reading it that this clauſe is technically penned; and though throughout the kingdom it is well known theſe offices are executed by more perſons than one, and that there are other offices in which many perſons are joined, yet this act conſiders each officer as ſingle, and deſcribes him according to his office.

The preſent action was brought againſt the two defendants, as the bailiff of the town of *Aldborough*, for refuſing the plaintiff an inſpection of the book or books wherein were entered the admiſſion of freemen; and it is brought againſt them *jointly* as the *bailiff* or perſons executing that office. (His Lordſhip ſtated the caſe *verbatim*, and proceeded thus:)

At the trial there was no other queſtion or difficulty than barely whether the aſſembly book was within the deſcription of the act of parliament. And there can be no doubt as to that; becauſe the act relates to all books which contain the nomination and admiſſion of freemen, and this is ſuch a book, though it is not a book that comes down to late times. But a party may want to know whether other perſons have a right by ſervitude, &c. as well as to diſcover who are occaſional freemen, therefore he has a right to inſpect all ſuch books and papers. In this caſe the ſtampt book, at beſt, is but an irregular one. But it did appear to me on the ſtate of the caſe, that the bailiffs had conceived a doubt upon that point; and having been taught to believe, from the circumſtance of the occaſional freemen being entered in the ſtampt book, and the act of parliament operating only upon ſuch freemen as were admitted within a year, that the ſtampt book was the only book within the meaning of the act, they had proceeded under an apprehenſion that they were right in refuſing an inſpection of any other.

* His Lordſhip laid a ſtreſs upon the name of each different officer being in the ſingular number.

That

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That being the light in which I ſaw their conduct, I did not doubt at all that for ſeveral offences ſeveral penalties might be recovered; but I thought a verdict for ſo many penalties hard and unreaſonable. No doubt if a party choſe to go to the utmoſt extent and rigour of the act, he might, by repeated demands, raiſe 10,000 *l.* or a larger ſum. I therefore was willing to liſten to the objections, and recommended it to the parties to conſider whether they would inſiſt upon all the penalties.

A formal objection which has been made is, Whether the action can be maintained againſt *both*; and moſt undoubtedly it may; for the breach of truſt in one is a breach of truſt in both. But in this caſe the fact is, that they both refuſed: therefore there can be no doubt but that they might be charged *jointly*.

*Aſton* Juſtice. The right given by the act of parliament, is a right of inſpecting all books in which the admiſſions of freemen are inſerted: and copies may be taken by the parties applying. And a candidate may not only want them for the purpoſe of ſeeing who his adverſaries are; but it may be likewiſe neceſſary to him for the purpoſe of taking copies of the admiſſions of his own voters. Therefore he has clearly a right to ſee *all* the books.

With regard to the other queſtion, Whether the action will lie againſt them jointly; the bailiffs are in law but one officer. If one had opened the books and the other had refuſed, no action could lie againſt the latter. But here both refuſed; and both muſt anſwer for the delinquency of both.

Mr. Juſtice *Wilſes* and Mr. Juſtice *Aſhhurſt* of the ſame opinion.

Let the *Poſtea* be delivered to the plaintiff.

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## CLARKE *verſus* SHLE and JOHNSON.

*Tueſday, Nov. 22d.*

Caſe for *money had and received*, will lie by the *true owner* of money or notes againſt a third perſon, into whoſe hands they have come *malâ fide*; provided their identity can be traced and aſcertained.

THIS was an action of treſpaſs on the caſe, wherein the plaintiff declared, that the defendants on the 1ſt of *June* 1773, at *London*, &c. were indebted to the plaintiff in the ſum of 1,000*l.* for divers ſums of money to the defendants, by the plaintiff, at the ſpecial inſtance and requeſt of the defendants, before that time lent and advanced. There were two other counts for money laid out and expended, and for *money had and received* by the defendants to the plaintiff's uſe.

To this declaration the defendants pleaded the *general iſſue*, and thereupon iſſue was joined.

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This caſe came on to be tried at the ſittings after *Trinity* term 1774, at *Guildhall*, *London*, before Lord *Mansfield*; when a verdict was found for the plaintiff, damages 459 *l.* 4 *s.* 4 *d.* and coſts 40 *s.* ſubject to the opinion of the court upon the following caſe.

That *David Wood* being a clerk to the plaintiff a brewer, and receiving money from the plaintiff's cuſtomers, and alſo negotiable notes for the plaintiff's uſe in the ordinary courſe of buſineſs, paid ſeveral ſums with the ſaid money and notes at different times, to the amount of 459 *l.* 4 *s.* 4 *d.* to the defendants upon the chances of the coming up of tickets in the *State Lottery* of 1772, contrary to the lottery act of the ſaid year 1772.

The plaintiff and the ſaid *Wood*'s ſureties have releaſed him.

The queſtion was, Whether the ſaid *Wood* ought to have been admitted as a witneſs to prove the above caſe, and ſuppoſing his evidence admiſſible, whether the plaintiff is entitled to recover in this action.

Mr. *Davenport* for the plaintiff. Two queſtions ariſe in this caſe, 1ſt, Whether *Wood* ought to have been admitted as a witneſs? and 2dly, Whether the plaintiff is entitled to recover?

*Firſt*, as to the latter queſtion, Whether the plaintiff had a right to recover? This depends upon whether the money was originally the plaintiff's property. If it was, and it appears that the defendants have no right to withhold it, the law will imply an *aſſumpſit* in this caſe. Now it is in evidence that the money was paid to the defendants for the inſurance of chances, contrary to the expreſs prohibition of the *ſtat.* 12 *Geo.* 3. *c.* 36. which in that caſe makes the receipt *null* and *void*; therefore they are wrong doers, and have no right to withhold it. It is likewiſe in evidence that this was the identical money which *Wood* had received for his maſter's uſe; conſequently, if the teſtimony of *Wood* is admiſſible, the plaintiff is entitled to recover.

II. Point. *Wood* is an admiſſible witneſs: 1ſt, Becauſe by the releaſe it was indifferent to him whether his maſter recovered or not; therefore he is a diſintereſted ſervant; but if not, in caſes of neceſſity like this, even an intereſted ſervant may be a witneſs. 2dly, If objected that he was incapacitated, as being *particeps criminis*, the exception will not hold; becauſe here, the plaintiff is an innocent perſon; and therefore had a right to call him in ſupport of this action.

Mr. *Buller contra* for the defendants. II. Point. *Wood* is a *particeps criminis*; and therefore clearly incompetent: for no man

ſhall

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ſhall be admitted to prove his own turpitude; as perjury or the like. This man was called to prove himſelf guilty of a breach of truſt in embezzling his maſter's money, and alſo of a breach of the act of parliament; therefore his evidence was inadmiſſible. In *Holt* verſus *Tyrell*, *Eaſt*, 13 *Geo.* 1. *R. B.* at bar, a truſtee was not allowed to prove himſelf guilty of a breach of truſt. The caſe was this; in debt upon bond the defendant pleaded the *Stat.* 5 and 6 *Ed.* 6. *c.* 16. againſt buying and ſelling offices: and upon the trial a witneſs was called to give an account upon what occaſion the bond was given: but Lord *Raymond* chief juſtice, refuſed to admit him, becauſe he was privately entruſted to make the bargain by both parties, and to keep it ſecret.

1ſt Point. The plaintiff is not entitled to recover; for there is no contract either expreſs or implied in reſpect of him; nor was the money ever received as his: on the contrary, the whole tranſaction was between the defendant and the witneſs; and ſo far as in an illegal proceeding like this, which is *ipſo facto* void, there can be ſaid to be any undertaking by the defendants, it has been complied with: for though they were fortunate by the numbers not coming up, yet they have run the riſk, and therefore performed their part of the agreement: conſequently, there is no foundation for an action to recover back the money paid. It is like the caſe of money given to an agent to bribe a cuſtom-houſe officer; in which caſe no action will lie to recover it back; or money paid upon an uſurious contract, which was the caſe in *Tomkins* verſus *Barnett*, 1 *Salk.* 22.

Lord MANSFIELD. That caſe has been denied a thouſand times.

Mr. *Buller*. But the principle is a ſound one, and applies in this caſe; namely, that *ex maleficio non oritur contractus*; *et in pari delicto potior eſt conditio defendentis*: there the tranſaction was illegal, therefore no action will lie.

Lord MANSFIELD after ſtating the caſe. As to the firſt queſtion there can be no doubt but that *Wood* was an admiſſible witneſs. In *Buſh* verſus *Rawlins*, in debt upon the *Stat.* 2 *Geo.* 2. *c.* 24. againſt bribery, a man who had taken the bribery oath, was held a competent witneſs, to prove that he himſelf had been bribed.

The next queſtion is, Whether the plaintiff can maintain this action? This is a liberal action in the nature of a bill in equity; and if, under the circumſtances of the caſe, it appears that the

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defendant cannot in conſcience retain what is the ſubject-matter of it, the plaintiff may well ſupport this action.

There are two ſorts of prohibitions enacted by poſitive law, in reſpect of contracts. 1ſt. To protect weak or neceſſitous men from being over-reached, defrauded, or oppreſſed. There the rule *in pari delicto, potior eſt conditio defendentis*, does not hold; and an action will lie; becauſe where the defendant impoſes upon the plaintiff it is not *par delictum*.

The caſe of *Tomkins* verſus *Barnett*, has been long exploded. In *Beſanquet* verſus *Daſhwood*, Lord *Hardwicke* and Lord *Talbot* both declared their diſapprobation of it: for in that caſe there was not *par delictum*. In the caſe of money given by a bankrupt or his relations * to a creditor, to ſign the certificate, the tranſaction is againſt the expreſs prohibition of the act of parliament, and both are parties to it, but not equally guilty; for the bankrupt is an oppreſſed party; and therefore the action will lie.

* *Smith* v. *Bromley*, coram Ld. *Mansfield*, 1760. *Buller's Ni. Pri.* 132.

The next ſort of prohibition is founded upon general reaſons of policy and public expedience. There both parties offending are equally guilty; *par eſt delictum, et potior eſt conditio defendentis*. The prohibition in the lottery act, *ſtat.* 12. *Geo.* 3. *c.* 63. is of this ſort; and in this caſe no doubt but the defendants and the witneſs *Wood*, were equally guilty. Therefore at *Guildhall*, upon the firſt impreſſion, I was of opinion againſt the plaintiff; becauſe I thought that the maſter could not ſtand in a better ſituation than the ſervant, and the ſervant was clearly *particeps criminis*. But I changed my opinion: I thought, and now think, the plaintiff does not ſue as ſtanding in the place of *Wood* his clerk: for the money and notes which *Wood* paid to the defendants, are the identical notes and money of the plaintiff. Where money or notes are paid *bonâ fide*, and upon a valuable conſideration, they never ſhall be brought back by the true owner; but where they come *malâ fide* into a perſon's hands, they are in the nature of ſpecific property; and if their identity can be traced and aſcertained, the party has a right to recover. It is of public benefit and example that he ſhould: but otherwiſe, if they cannot be followed and identified, becauſe there it might be inconvenient and open a door to fraud. *Miller* verſus *Race*, 1 *Bur.* 452: and in *Golightly* verſus *Reynolds*, the identity was traced through different hands and ſhops. Here the plaintiff ſues for his identified property, which has come to the hands of the defendants iniquitouſly and illegally, in breach of the

act of parliament. Therefore they have no right to retain it; and consequently the plaintiff is well entitled to recover. 1794.

The three other judges concurred.

Judgment for the plaintiff.

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GOODRIGHT ex dim. ELIZABETH CARTER, *versus* STRAPHAN and others. *Same day.*

UPON shewing cause why a new trial should not be granted the case appeared to be as follows:

In ejectment for a house in *Thames-street*, the lessor of the plaintiff shewed a right under the will of one *James Roberts*, dated *July* 14th, 1710. The defendants claimed as or under the representatives of one *Greening*, who had been in possession from the year 1737. But it was shewn that he had accounted for the rents and profits, to the lessor of the plaintiff and her husband, and therefore there was no pretence for a bar by the statute of limitations. But the objection was, that by indenture bearing date 19th *July* 1737, and made between *Charles Carter* and *Elizabeth* his wife on the one part, and *William Greening*, on the other part, reciting, that *Elizabeth Carter*, the lessor of the plaintiff, after the decease of *Mary Trimmer*, by virtue of the will of *James Roberts*, was or would be well entitled to the inheritance of the said house in *Thames-street*, and also to three other houses in *Reading*: and reciting, that the said *Charles Carter* was then indebted to *Greening*, in 102 *l.* and at the special instance and request of the said *Charles Carter*, and *Elizabeth* his wife, had agreed to furnish them with a further sum of 144 *l.* for the maintenance and subsistence of them and their family, so long as the said *Mary Trimmer* should live; by way of mortgage, they demise to him as well the said house in *Thames-street*, as the three houses in *Reading*, for the term of 99 years, at a pepper-corn rent, from the death of the said *Mary Trimmer*; nevertheless upon condition, that if the said *Carter* or his wife, or one of them, their executors, administrators, or assigns, should pay to the said *Greening* the said sum, *&c.* with interest, at the end of six months after the decease of *Mary Trimmer*, then the said indenture of demise should cease, *&c.* and the husband covenants that he would pay, *&c.* and the deed was executed by both.

Re-delivery by *feme*, after death of *baron*, of a deed delivered by her whilst *covert*, is a sufficient *confirmation* of such deed, so as to bind her, without its being re-executed, or re-attested. And *circumstances alone* may be *equivalent* to such re-delivery, tho' the deed be a joint-deed by *baron* and *feme* affecting the wife's land, and no fine levied.

Three

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Three exhibits were produced, all ſubſequent to the death of *Charles Carter* the huſband. The firſt was an account ſtated, conſiſting amongſt other articles of a receipt for rent of the houſe in *Thames-ſtreet*, from 1755 to 1760, out of which was deducted an article for *intereſt* due, a balance ſtruck, and the account ſigned by *Elizabeth Carter*.

The ſecond as follows: 23d *May*, 1763. I do hereby *ſurrender* the *poſſeſſion* of a houſe belonging to me at *Reading*, late in the occupation of Mr. *Collins*, but now empty, to Mr. *Thomas Sanders* and *William Smith*, executors of Mr. *William Greening*, deceaſed, the mortgagee thereof. Signed *Elizabeth Carter*; witneſs *John Lewis*.

The third, 23d *May*, 1763. Mr. *Miles*, I do hereby *direct* you to *attorn* tenant for your houſe and ſhop at *Reading*, from *Lady-day* laſt, to Mr. *Thomas Sanders* and Mr. *William Smith*, executors of Mr. *William Greening*, the mortgagee of the ſaid premiſes, and to pay them all rent that ſhall become due for the ſame, from that time; and I deſire you will pay the rent that was due at *Lady-day* laſt, to the ſame perſon as you formerly paid your rent to for my uſe. Signed *Elizabeth Carter*; witneſs *John Lewis*.

Mr. *Wallace* and Mr. *Bearcroft* for the defendants argued, that the leaſe was not void, but only voidable, and that the acts done by the plaintiff amounted to a confirmation of the deed: and cited *Hutton* 55. 102. 2. *Rep.* 60. *Wiſcot's* caſe. *Dyer* 91. *pl.* 13. *Dyer* 159. *Cro. Eliz.* 112. *Jackſon v. Mordaunt.* 1 *Rol. Abr.* 475.

Mr. *Dunning*, *contra*, for the plaintiff, inſiſted that the deed of a married woman is void: and that in this caſe there was no act of ratification as to the houſe in *London*, for which the preſent ejectment was brought, whatever there might be as to the lands in *Reading*. That with reſpect to the authorities cited, they were all caſes of leaſes, in ſupport of which the court had been very liberal: but this was a mortgage, not a leaſe; and therefore not within the reaſon of thoſe caſes.

*Cur adviſare vult.*

Afterwards, on *Thurſday* the 24th of *November*, Lord *Mansfield* delivered the opinion of the court. His lordſhip ſtated the caſe as above and then proceeded as follows:

It is inſiſted by the defendants, that the ſeveral exhibits proved in the cauſe amount to a ratification of the mortgage by the leſſor of the plaintiff. In ſtrictneſs, a fine is the proper method for a married woman to part with her right; ſo that a formality

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of law only is wanting. But in conſcience ſhe has confirmed this ſecurity which was entered into for the maintenance and ſupport of herſelf and family. She and her huſband, in immediate want of money for their ſubſiſtence, apply to *Greening*, to lend them 150 *l.* upon the mortgage of a reverſion: *Greening* readily acquieſces, advances it without reſerve, and is content to lay out of his money 'till the reverſion ſhould fall in. In a caſe ſo circumſtanced, I thought it cruel to contend for the wife, that the mortgage was void; and after ſo many ſolemn acts on her part, it is a proceeding againſt every principle of natural juſtice and equity. Therefore I directed the jury, that if they thought the facts given in evidence amounted to a ſufficient confirmation by the wife, they ſhould find for the defendants; and they have ſo done.

Mr. *Wallace* at the trial put it upon the footing of leaſes by huſband and wife reſerving rent or no rent; which the authorities ſay are not void, but only voidable by the wife after the huſband's death, and if ſhe ratifies them ſhe is bound. It was anſwered, that thoſe authorities were by way of exception to the general rule of law, which ſays, the deed of a married woman is void; and they were allowed of for the ſake of agriculture and tillage. That this, it is true, is a leaſe for 99 years, and a century ago the court would not have ſeen further; but now it is ſaid the court muſt look further and ſee the real intent of the deed; namely, that it was a mortgage.

We are all of opinion, that the anſwer is a good one, and that the exception to the general rule was allowed of for the advancement of agriculture and tillage.

We are alſo of opinion, that the court ought to look into the ſubſtance of the deed, and to ſee with the ſame eyes as the reſt of the world: it is in *ſubſtance* a *mortgage*, though in *form* a *leaſe* for 99 years. But we think we have good authority to ſay, that the wife is nevertheleſs bound by it, and that her ſubſequent acts ſet up this mortgage againſt her.

*Perkins*, which is a very good authority in point of law, in *ſect.* 154. ſays, "It is to be known that a deed cannot have "and take effect at every delivery as a deed; for if the firſt de- "livery take effect, the ſecond delivery is void. As in caſe an "infant, or a man in priſon, makes a deed, and deliver the ſame "as his deed, *&c.* and afterwards the infant, when he cometh "to his full age, or the man impriſoned when he is at large, de- "liver again the ſame deed as his deed, which he delivered before

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" as his deed, this ſecond delivery is void. But if a married " woman deliver a bond unto me, or other writing as her deed, " this delivery is merely void; and, therefore, if after the death " of her huſband ſhe being ſole, *deliver* the ſame deed *again* " unto me as her deed, the *ſecond delivery* is *good* and *effectual*." The year books, *Mich.* 3 *Hen.* 6. 4. and *Hil.* 8 *Hen.* 6. 8. confirm the propoſition laid down by *Perkins*; namely, that the deed is not to be re-executed or re-atteſted, but delivered only. Now delivery is an act in *pais* only.

The queſtion then is, Whether the law has laid down any preciſe form in which delivery muſt be made, or whether circumſtances may not be equivalent to it without actual delivery?

Lord *Coke* in his Commentary on *Lit.* 36, ſays, " As a deed " may be delivered to the party without words, ſo a deed may " be delivered by words, without any act of delivery: as if the " writing ſealed lies upon the table, and the feoffor or obligor " ſays to the feoffee or obligee, take up the ſaid writing, it is " ſufficient for you, as it will ſerve your turn, it is a ſufficient " delivery."—2 *Roll. Abr.* 26. *pl.* 2.

This brings it to the ſingle queſtion, Whether theſe facts amount to a delivery. Now the mortgage deed was in the hands of the mortgagee: the wife, after the death of her huſband the mortgagor, ſurrenders poſſeſſion under her own hand to *Sanders* and *Smith*, the executors of the mortgagee, and orders the tenants to attorn to them as executors of the mortgagee in terms. This is a clear acknowledgment that the deed was hers, and that ſhe was content, the defendants ſhould enjoy according to the terms of the deed.

Therefore, we are all of opinion for the defendants, and that theſe facts were a confirmation of the mortgage, upon the ground of their being equivalent to a re-delivery of the deed.

*Per. Cur.* unanimouſly. Rule for a new trial diſcharged.

## CAMPBELL *verſus* HALL.

THIS caſe was very elaborately argued four ſeveral times; and now on this day Lord *Mansfield* ſtated the caſe, and delivered the unanimous opinion of the court, as follows:

This is an action that was brought by the plaintiff *James Campbell*, who is a natural born ſubject of this kingdom, and who, upon the 3d of *March* 1763, purchaſed a plantation in the iſland of *Grenada*: and it is brought againſt the defendant *William*

*William Hall*, who was a collector for his Majesty of a duty of four and an half *per cent.* upon all goods and sugars exported from the island of *Grenada*. And the action is brought to recover back a sum of money which was paid, as this duty of four and an half *per cent.*, upon sugars that were exported from the island of *Grenada*, by and on account of the plaintiff. The action is an action for money had and received; and it is brought upon this ground; namely, that the money was paid to the defendant without any consideration; the duty, for which, and in respect of which he received it, not having been imposed by lawful or sufficient authority to warrant the same. It is stated by the special verdict, that that money still remains in the hands of the defendant, *not paid over* by him to the use of the king, but continued in his hands, and so continues with the privity and *consent* of his Majesty's *Attorney General*, for the express purpose of trying the question as to the validity of imposing this duty. 1774. CAMPBELL *versus* HALL.

It came on to be tried at *Guildhall*, and of course, from the nature of the question, both sides came prepared to have a special verdict; and a special verdict was found, which states as follows.

That the island of *Grenada* was taken by the *British* arms, in open war, from the *French* king.

That the island of *Grenada* surrendered upon capitulation, and that the capitulation on which it surrendered, was by reference to the capitulation upon which the island of *Martinique* had before surrendered.

The special verdict then states some articles of the capitulation, and particularly the 5th article, by which it is agreed, That *Grenada* should continue to be governed by its present laws until his Majesty's further pleasure be known. It next states the 6th article; where, to a demand of the inhabitants of *Grenada*, requiring that they should be maintained in their property and effects, moveable and immoveable, of what nature soever, and that they should be preserved in their privileges, rights, honors, and exemptions; the answer is, the inhabitants, being *subjects* of *Great Britain*, will enjoy their properties and privileges in like manner as the other *his Majesty's subjects* in the other *British Leeward Islands*: so that the answer is, that they will have the consequences of their being subjects, and that they will be as much subjects as any of the other *Leeward Islands*.

Then it states another article of the capitulation; *viz.* the 7th article, by which they demand, that they shall pay no other duties

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duties than what they before paid to the *French* king; that the capitation tax ſhall be the ſame, and that the expences of the courts of juſtice, and of the adminiſtration of government, ſhould be paid out of the king's demeſne: in anſwer to which they are referred to the anſwer I have ſtated, as given to the foregoing article; that is, being *ſubjects* they will be entitled in like manner as the *other his Majeſty's ſubjects* in the *Britiſh Leeward Iſlands*.

The next thing ſtated in the ſpecial verdict is, the treaty of peace ſigned the 10th *February*, 1763; and it ſtates that part of the treaty of peace by which the iſland of *Grenada* is ceded; and ſome clauſes which are not at all material for me to ſtate.

The next inſtrument is a proclamation under the great ſeal, bearing date the 7th of *October*, 1763, wherein amongſt other things it is ſaid as follows:

Whereas it will greatly contribute to the ſpeedy ſettling our ſaid governments, of which the iſland of *Grenada* is one, that our loving ſubjects ſhould be informed of our paternal care for the ſecurity of the liberties and properties of thoſe who are and ſhall become inhabitants thereof: we have thought fit to publiſh and declare by this our proclamation, that we have in our *letters patent* under our great ſeal of *Great Britain*, by which the ſaid governments are conſtituted, given *expreſs power* and *direction* to our governors of the ſaid colonies reſpectively, that ſo ſoon as the ſtate and circumſtances of the ſaid colonies will admit thereof, they ſhall, with the advice and conſent of the members of our council ſummon and call general aſſemblies, within the ſaid governments reſpectively, in ſuch manner and form as is uſed and directed in thoſe colonies and provinces of *America*, which are already under our immediate government; and we have alſo given power to the ſaid governors, with the conſent of our ſaid councils, and the *repreſentatives of the people* to be ſummoned as aforeſaid, *to make, conſtitute, and ordain laws*, ſtatutes, and ordinances, for the public peace, welfare, and good government of our ſaid colonies and the inhabitants thereof, as near as may be agreeable to the laws of *England*, and under ſuch regulations and reſtrictions, as are uſed in our other colonies.

The next inſtrument ſtated in the ſpecial verdict, is the *letters patent* under the great ſeal, or rather a proclamation, bearing date the 26th *March*, 1764; wherein, the king recites a ſurvey and diviſion of the ceded iſlands, and that he had ordered them

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to be divided into allotments, as an invitation to purchaſers to come in and purchaſe upon the terms and conditions ſpecified in that proclamation.

The next inſtrument ſtated, is the *letters patent* under the great ſeal, bearing date the 9th of *April*, 1764. In theſe letters there is a commiſſion appointing General *Melville* governor, with a *power* to *ſummon an aſſembly* as ſoon as the ſtate and circumſtances of the iſland would admit, and to make laws with conſent of the governor and council, with reference to the manner of the other aſſemblies of the king's provinces in *America*. This inſtrument is dated the 9th of *April*, 1764. The governor arrived in *Grenada* on the 14th *December*, 1764, and before the end of the year 1765, an aſſembly actually met in the iſland of *Grenada*. But before the arrival of the governor at *Grenada*, indeed before his departure from *London*, there is another inſtrument upon the validity of which the whole queſtion turns, which inſtrument contains *letters patent* under the great ſeal, bearing date the 20th *July*, 1764. Wherein, the king reciting, that whereas, in *Barbadoes*, and in all the *Britiſh Leeward Iſlands*, there was a duty of four and an half *per cent.* upon all ſugars, *&c.* exported; and reciting in theſe words; that whereas it is reaſonable and expedient, and of importance to our other ſugar iſlands, that the like duty ſhould take place in our ſaid iſland of *Grenada*; proceeds thus: we have thought fit, and our royal will and pleaſure is, and we do hereby, by virtue of our prerogative royal, order, direct, and appoint, that from and after the 29th day of *September* next enſuing the date of theſe preſents, a duty or impoſt of four and an half *per cent.* in ſpecie, ſhall be raiſed and paid to us, our heirs and ſucceſſors, upon all dead commodities, the growth and produce of our ſaid iſland of *Grenada*, that ſhall be ſhipped off from the ſame, *in lieu of all cuſtoms and import duties*, hitherto collected upon goods imported and exported into and out of the ſaid iſland, under the authority of his moſt Chriſtian Majeſty.

The ſpecial verdict then ſtates that in fact this duty of four and an half *per cent.* is paid in all the *Britiſh Leeward Iſlands*, and ſets forth the ſeveral acts of aſſembly relative to theſe duties. They are public acts: therefore, I ſhall not ſtate them; as any gentleman may have acceſs to them; they depend upon different circumſtances and occaſions, but are all referable to thoſe duties in our iſlands. This, with what I ſet out with in the opening,

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is the whole of the ſpecial verdict that is material to the queſtion."

The general queſtion that ariſes out of all theſe facts found by the ſpecial verdict, is this; whether the *letters patent* under the great ſeal, bearing date the 20th *July*, 1764, are good and valid to abolish the *French* duties; and in lieu thereof to impoſe the four and half *per cent.* duty above mentioned, which is paid in all the *Britiſh Leeward Iſlands?*

It has been contended at the bar, that the *letters patent* are void on two points; the *firſt* is, that although they had been made before the proclamation of the 7th *October*, 1763, yet the king could not exerciſe ſuch a legiſlative power over a conquered country.

The *ſecond* point is, that though the king had ſufficient power and authority before the 7th *October*, 1763, to do ſuch legiſlative act, yet before the *letters patent* of the 20th *July*, 1764, he had diveſted himſelf of that authority.

A great deal has been ſaid, and many authorities cited relative to propoſitions, in which both ſides ſeem to be perfectly agreed; and which, indeed are too clear to be controverted. The ſtating ſome of thoſe propoſitions which we think quite clear, will lead us to ſee with greater perſpicuity, what is the queſtion upon the firſt point, and upon what hinge it turns. I will ſtate the propoſitions at large, and the firſt is this:

A country conquered by the *Britiſh* arms becomes a dominion of the king in the right of his crown; and, therefore, neceſſarily ſubject to the legiſlature, the parliament of *Great Britain.*

The 2d is, That the conquered inhabitants once received under the king's protection, become ſubjects, and are to be univerſally conſidered in that light, not as enemies or aliens.

The 3d, That the articles of capitulation upon which the country is ſurrendered, and the articles of peace by which it is ceded, are ſacred and inviolable according to their true intent and meaning.

The 4th, That the law and legiſlative government of every dominion, equally affects all perſons and all property within the limits thereof; and is the rule of deciſion for all queſtions which ariſe there. Whoever purchaſes, lives, or ſues there, puts himſelf under the law of the place. An *Engliſhman* in *Ireland*, *Minorca*, the *Iſle of Man*, or the *Plantations*, has no privilege diſtinct from the natives.

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The 5th, That the laws of a conquered country continue in force, until they are altered by the conqueror: the abſurd exception as to *Pagans*, mentioned in *Calvin's* caſe, ſhews the univerſality and antiquity of the maxim. For that diſtinction could not exiſt before the Chriſtian æra; and in all probability aroſe from the mad enthuſiaſm of the *Croiſades*. In the preſent caſe the capitulation expreſsly provides and agrees, that they ſhall continue to be governed by their own laws, until his majeſty's further pleaſure be known.

The 6th, and laſt propoſition is, that if the king (and when I ſay the king, I always mean the king without the concurrence of parliament,) has a power to alter the old and to introduce new laws in a conquered country, this legiſlation being ſubordinate, that is, ſubordinate to his own authority in parliament, he cannot make any new change contrary to fundamental principles: he cannot exempt an inhabitant from that particular dominion; as for inſtance, from the laws of trade, or from the power of parliament, or give him privileges excluſive of his other ſubjects; and ſo in many other inſtances which might be put.

But the preſent change, if it had been made *before* the 7th *October* 1763, would have been made recently after the ceſſion of *Grenada* by treaty, and is in itſelf moſt reaſonable, equitable, and political; for it is putting *Grenada*, as to duties, on the ſame footing with all the *Britiſh Leeward Iſlands*. If *Grenada* paid more it would have been detrimental to her; if leſs, it muſt be detrimental to the other *Leeward Iſlands*: nay, it would have been carrying the capitulation into execution, which gave the people of *Grenada* hopes, that if any new tax was laid on, their caſe would be the ſame with their fellow ſubjects in the other *Leeward Iſlands*.

The only queſtion then on this firſt point is, Whether the king had a power to make ſuch change *between* the 10th of *February*, 1763, the day the treaty of peace was ſigned, and the 7th *October*, 1763? Taking theſe propoſitions to be true which I have ſtated; the only queſtion is, Whether the *king* had of *himſelf* that power?

It is left by the conſtitution to the king's authority to grant or refuſe a capitulation: if he refuſes, and puts the inhabitants to the ſword or exterminates them, all the lands belong to him. If he receives the inhabitants under his protection and grants them their property, he has a power to fix ſuch terms and conditions as he thinks proper. He is intruſted with making the

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treaty of peace: he may yield up the conqueſt, or retain it upon what terms he pleaſes. Theſe powers no man ever diſputed, neither has it hitherto been controverted that the king might change part or the whole of the law or political form of government of a conquered dominion.

To go into the hiſtory of the conqueſts made by the crown of *England*.

*Ireland.* The conqueſt and the alteration of the laws of *Ireland* have been variouſly and learnedly diſcuſſed by lawyers and writers of great fame, at different periods of time: but no man ever ſaid, that the change in the laws of that country was made by the parliament of *England*: no man ever ſaid the crown could not do it. The fact in truth, after all the reſearches which have been made, comes out clearly to be, as it is laid down by Lord Chief Juſtice *Vaughan**, that *Ireland* received the laws of *England*, by the charters and commands of *Hen.* 2, king *John*, *Hen.* 3. and he adds an *et cætera* to take in *Ed.* 1. and the ſubſequent kings. And he ſhews clearly the miſtake of imagining that the charters of the 12th of *John*, were by the aſſent of a parliament of *Ireland*. Whenever the firſt parliament was called in *Ireland*, that change was introduced without the interpoſition of the parliament of *England*; and muſt, therefore, be derived from the crown.

*Vaugh. Rep.* 292.

*Wales.* Mr. *Barrington* is well warranted in ſaying that the ſtatute of *Wales*, 12th *Ed.* 1ſt, is certainly no more than *regulations* made by the *king* in his council, for the government of *Wales*, which the preamble ſays was then totally ſubdued. Though, for various political purpoſes, he feigned *Wales* to be a *feoff* of his crown; yet he governed it as a *conqueſt*. For *Ed.* 1ſt never pretended that he could, without the aſſent of parliament, make laws to bind any part of the realm.

*Berwick.* *Berwick*, after the conqueſt of it, was governed by charters from the crown without the interpoſition of parliament, till the reign of *Jac.* 1ſt.

*Gaſcony, Guienne, Calais.* All the alterations in the laws of *Gaſcony*, *Guienne*, and *Calais*, muſt have been under the *king*'s authority; becauſe all the acts of parliament relative to them are extant. For they were in the reign of *Edward* 3d, and all the acts of parliament of that time are extant. There are ſome acts of parliament relative to each of theſe conqueſts that I have named, but none for any change of their laws, and particularly with regard

gard to *Calais*, which is alluded to as if their laws were considered as given by the crown. 1774.

Besides the garrison, there are inhabitants, property, and trade in *Gibraltar*: ever since that conquest the king has made orders and regulations suitable to those who live, &c. or trade, or enjoy property in a garrison town. HARE versus CAMPBELL. *Gibraltar.*

The *Attorney General* alluded to a variety of instances, and several very lately, in which the king had exercised legislation in *Minorca*: there, there are many inhabitants, much property, and trade. If it is said, that the king does it as coming in the place of the king of *Spain*, because their old constitution remains, the same argument holds here. For before the 7th *October* 1763, the original constitution of *Grenada* continued, and the king stood in place of their former sovereign. *Minorca.*

After the conquest of *New York*, in which most of the old *Dutch* inhabitants remained, king *Charles* 2d changed the form of their constitution and political government; by granting it to the duke of *York*, to hold of his crown, under all the regulations contained in the *letters patent*. *New York.*

It is not to be wondered at that an adjudged case in point has not been produced. No question was ever started before, but that the king has a right to a legislative authority over a conquered country; it was never denied in *Westminster-hall*; it never was questioned in parliament. *Coke*'s Report of the arguments and resolutions of the judges in *Calvin*'s case, lays it down as clear. If a king (says the book) comes to a kingdom by conquest, he may change and alter the laws of that kingdom; but if he comes to it by title and descent, he cannot change the laws of himself without the consent of parliament*. It is plain he alludes to his own country, because he alludes to a country where there is a parliament. *7 Rep. 17. b.

The authority also of two great names has been cited, who take the proposition for granted. In the year 1722, the assembly of *Jamaica* being refractory, it was referred to Sir *Philip Yorke* and Sir *Clement Wearge*, to know "what could be done if the "assembly should obstinately continue to withhold all the usual "supplies." They reported thus: "If *Jamaica* was still to be "considered as a *conquered island*, the *king* had a *right* to *levy* "*taxes* upon the inhabitants; but if it was to be considered in "the *same light* as the other *colonies*, no tax could be imposed "on the inhabitants but *by an assembly of the island*, or by an "*act of parliament*."

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They considered the distinction in law as clear, and an indisputable consequence of the island being in the one state or in the other. Whether it remained a conquest, or was made a colony they did not examine. I have upon former occasions traced the constitution of *Jamaica*, as far as there are papers and records in the offices, and cannot find that any *Spaniard* remained upon the island so late as the restoration; if any, there were very few. To a question I lately put to a person well informed and acquainted with the country, his answer was, there were no *Spanish* names among the white inhabitants, there were among the negroes. King *Charles* 2d by proclamation invited settlers there, he made grants of lands: he appointed at first a governor and council only: afterwards he granted a commission to the governor to call an assembly.

The constitution of every province, immediately under the king, has arisen in the same manner; not from grants, but from commissions to call assemblies: and, therefore, all the *Spaniards* having left the island or been driven out, *Jamaica* from the first settling was an *English* colony, who under the authority of the king planted a vacant island, belonging to him in right of his crown; like the cases of the island of St. *Helena* and St. *John*, mentioned by Mr. *Attorney General*.

A maxim of constitutional law as declared by all the judges in *Calvin*'s case, and which two such men, in modern times, as Sir *Philip Yorke* and Sir *Clement Wearge*, took for granted, will require some authorities to shake.

But on the other side, no book, no saying, no opinion has been cited; no instance in any period of history produced, where a doubt has been raised concerning it. The counsel for the plaintiff no doubt laboured this point from a diffidence of what might be our opinion on the second question. But upon the second point, after full consideration we are of opinion, that *before* the *letters patent* of the 20th *July*, 1764, the *king* had *precluded* himself from the exercise of a legislative authority over the island of *Grenada*.

The first and material instrument is the proclamation of the 7th *October*, 1763. See what it is that the king there says, with what view, and how he engages himself and pledges his word.

"For the better security of the liberty and property of those "who are or shall become inhabitants of our island of *Grenada*, "we have declared by this our proclamation, that we have "commissioned our governor (as soon as the state and circum-

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" ſtances of the colony will admit,) *to call an aſſembly* to *enact* " *laws*," &c. With what view is this made? It is to invite ſettlers and ſubjects: and why to invite? That they might think their properties, *&c.* more ſecure if the legiſlation was veſted in an aſſembly, than under a governor and council only.

Next, having eſtabliſhed the conſtitution, the proclamation of the 20th *March*, 1764, invites them to come in as purchaſors: in further confirmation of all this, on the 9th *April*, 1764, three months before *July*, an actual commiſſion is made out to the governor to call an aſſembly as ſoon as the ſtate of the iſland would admit thereof. You obſerve, there is no reſervation in the proclamation of any legiſlature to be exerciſed by the *king*, or by the governor and council under his authority in any manner, until the aſſembly ſhould meet; but rather the contrary: for whatever conſtruction is to be put upon it, which, perhaps, may be very difficult through all the caſes to which it may be applied, it alludes to a government by *laws in being*, and by courts of juſtice, *not* by a *legiſlative* authority, until an aſſembly ſhould be called. There does not appear from the ſpecial verdict, any impediment to the calling an aſſembly immediately on the arrival of the governor, which was in *December*, 1764. But no aſſembly was called then or at any time afterwards, till the end of the year 1765.

We therefore think, that by the two proclamations and the commiſſion to governor *Melville*, the king had immediately and *irrecoverably* granted to all who were or ſhould become inhabitants, or who had, or ſhould acquire property in the iſland of *Grenada*, or more generally *to all whom it might concern*, that the ſubordinate legiſlation over the iſland ſhould be exerciſed by an aſſembly with the conſent of the governor and council, in like manner as the other iſlands belonging to the king.

Therefore, though the aboliſhing the duties of the *French* king and the ſubſtituting this tax in its ſtead, which according to the finding in this ſpecial verdict is paid in all the *Britiſh Leeward Iſlands*, is juſt and equitable with reſpect to *Grenada* itſelf, and the other *Britiſh Leeward Iſlands*, yet, through the inattention of the king's ſervants, in inverting the order in which the inſtruments ſhould have paſſed, and been notoriouſly publiſhed, the laſt act is contradictory to, and a violation of the firſt, and is, therefore, void. How proper ſoever it may be in reſpect to the object of the *letters patent* of the 20th *July*, 1764, to uſe the words of Sir *Philip Yorke* and Sir *Clement Wearge*, " *it can only*

1774. "*now be done, by the aſſembly of the iſland, or by an act of the* "*parliament of Great Britain.*"

MALE verſus CARVELL. The conſequence is, judgment muſt be given for the plaintiff.

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## ELDRIDGE *verſus* KNOTT and Others.

*More length of time, ſhort of the period fixed by the ſtat. of limitations, and unaccompanied with any circumſtances, is not of itſelf a ſufficient ground to preſume a releaſe or extinguiſhment of a quit rent.*

UPON ſhewing cauſe why a new trial ſhould not be granted in this caſe, Mr. Juſtice *Aſhhurſt* reported from Baron *Eyre* as follows: this was an action of treſpaſs for breaking and entering the plaintiff's houſe, and deſtroying his goods. Plea not guilty. Verdict for the plaintiff.

The defendants were bailiffs of *Dennis Rolle*, Eſq.; lord of the manor of *Eaſt Suderly* and *Lockerly* in the county of *Wilts*; and the treſpaſs complained of, was for taking a diſtreſs for quit-rents due to the lord, in right of this manor. Upon evidence it appeared, that till the the year 1736, a quit rent had been regularly paid to the reſpective lords of this manor, for the tenement in queſtion. That in the year 1738, a demand was made and refuſed; ſince which time there had been no further demand, nor had any payment been made, till within theſe few years, from the year 1736 to the time of the preſent action. That in 1736, an action was tried between the lord of the manor and the owner of the tenement in queſtion, for cutting down two timber trees growing thereon; when a verdict was given for the tenant: ſince which the owners of the tenement in queſtion had refuſed to pay this quit rent, or to attend the lord's court.

Upon theſe facts Mr. Baron *Eyre* was of opinion, that though the claim of the defendant was not barred by the *ſtat.* of limitations, yet, that a non-payment and acquieſcence for 37 years, was a ſufficient ground to preſume a releaſe or extinguiſhment of the quit-rent; and left it to the jury to ſay, whether, upon the evidence, they would or would not preſume it was ſo releaſed or extinguiſhed: and the jury found it was.

Mr. *Buller* had moved for a new trial upon the ground of this being a miſdirection of the judge, and that the verdict was againſt evidence.

Mr. Serjeant *Davy* and Mr. *Kirby* ſhewed for cauſe; that though there was no caſe exactly in point, yet by analogy to the reaſoning and deciſion of the court in a variety of caſes, the direction of the judge in this caſe, was clearly a right direction.

In

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EDGWICK *ver.* KNOTT.

In 1. *Burr.* 434. a caſe is cited by the court, where payment of a bond was preſumed within 18 years. So in *Quo. War.* circumſtances may make it reaſonable to refuſe an information *within* 20 years. Even a grant from the crown has been preſumed, which muſt be by matter of record, though ſuch record did not appear *.

In this caſe there has been an acquieſcence for 34 years, and ſuch acquieſcence not merely *tacit*, but after a demand made and a refuſal given: therefore the defendant ought to ſhew ſome reaſon why, after ſuch refuſal, no ſubſequent demand was made, till juſt upon the eve of the preſent action; or the court will think, with the judge who tried the cauſe, that there is ground to preſume he has releaſed his right.

* *Vide* Mayor of *Hull* verſus *Horner*, *ante*, 102.

Mr. *Manſfield*, *contra*. In all the inſtances which have been mentioned, the length of time has been accompanied with circumſtances: but here there are no circumſtances; only mere non-payment. On the other hand, the quit-rent had been regularly paid till the year 1736. In 1738 it is demanded, and a refuſal given; but the demand, at that time, is a ſtrong proof that no conveyance or releaſe of it had been made ſince the laſt payment; if there had been, the tenant would have aſſigned it as a cauſe of refuſal; but no ſuch reaſon is aſſigned. If no circumſtances appear, the fact of non-payment alone is not of itſelf a ſufficient ground to ſupport the preſumption contended for; if it were, the ſtatute would be of no effect at all.

Lord MANSFIELD ſtopt him. The ſtatute of limitations is a poſitive bar from length of time; and operates ſo concluſively, that although the jury and the court are ſatisfied that the claim ſet up ſubſiſts, yet they are bound by the ſtatute to defeat the claim.

There are many caſes not within the ſtatute, where from a principle of quieting poſſeſſion the court has thought that a jury ſhould preſume any thing to ſupport a length of poſſeſſion.

Lord COKE ſays ſomewhere, that an act of parliament may be preſumed; and of late it has been held, that even in the caſe of the crown, which is not bound by the ſtatutes of limitation, a grant may be preſumed from great length of poſſeſſion. It was ſo done in the caſe of the corporation of *Hull* and *Horner* *: not that, in ſuch caſes, the court really thinks a grant has been made; becauſe, it is not probable a grant ſhould have exiſted, without its being upon record; but they preſume the fact, for the purpoſe and from a principle of quieting the poſſeſſion.

* *vide ante*, 102.

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But there is no inſtance of ſetting up any length of time within the limitation fixed by the ſtatute, as a *bar* to the demand: and in caſes of quit-rents, like the preſent, the reaſon for carrying back the limitation to the period fixed by the ſtatute, namely 50 years, is the ſtronger; becauſe the conſideration is ſo trifling. Though if a real ground for ſuppoſing a releaſe or extinguiſhment appeared, the ſmallneſs of the claim would have no weight. But in this caſe there is *mere length of time*, which, barely *as ſuch*, ought not to be received as a *bar*: and if ſo, the caſe ſtands without a pretence for ſuppoſing a releaſe or extinguiſhment. Becauſe, on the other hand, the exact time when the payment was firſt refuſed is in proof; and further, the real or more probable ground of ſuch refuſal appears; namely, that the tenant had ſucceeded in an action between him and his lord; not that the lord had releaſed it by any conveyance, or the like: and if ſo, it might be a good while before the lord might think proper to bring an action for *half a crown*. Therefore I am of opinion, that, upon the evidence, it ought not to have been left to a preſumption of law, within a leſs time than the period fixed by the ſtatute.

ASTON Juſtice. A preſumption from mere length of time, which is to ſupport a right, is very different from a preſumption to defeat a right: here, the preſumption is to defeat the right of the lord to a ſmall payment of half a crown, within the 50 years limited by the ſtatute; and therefore, upon mere length of time, unaccompanied with other circumſtances, ſuch limitation ought not to be altered and another ſet up. Beſides, in this caſe, there is reaſon to ſay, that a different foundation of refuſal, than that which it is contended ſhould be preſumed, appears; which is, that the tenant had defeated the lord in a law-ſuit depending between them: therefore, I am of opinion that the preſumption is defective, and that a new trial ſhould be granted.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt*, were of the ſame opinion.

*Per Cur.* Rule for a new trial made abſolute.

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Thurſday, Nov. 2nd.

## DOE ex dim. FISHAR and Wife, and TAYLOR and Wife, *verſus* PROSSER.

36 years ſole and uninterrupted poſſeſſion by *one tenant in common*, without any account to or demand made, or claim ſet up by his *companion*, held a ſufficient ground for a jury to *preſume* an *actual ouſter*, of the co-tenant.

UPON a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Lord *Manſfield* reported as follows:

This was an ejectment brought by the plaintiff for an undivided moiety of certain lands in *Enfield*, in the county of *Middleſex*. The leſſors of the plaintiff claimed title under *Mary Taylor*, who was *tenant* in tail *in common*, of the lands in queſtion, with her ſiſter under the will of one *Perkins*. The ſiſter was married to *Stevens*, after which, in the year 1705, there was a deed of partition, between *Mary Taylor* and *Stevens*, for the life of *Stevens*; by which deed all the lands in *Enfield* were allotted to him, and under which he enjoyed them till the year 1734, when he died: *Mary Taylor* died ſome years before.

From the year 1734, one tenant in common namely, the wife of *Stevens*, had been in the ſole poſſeſſion of theſe lands, without any claim or demand by any perſon or perſons claiming under *Mary Taylor*, deceaſed, the other tenant in common. No *actual ouſter* was proved; but upon the circumſtances, I left it to the jury to ſay, whether there was not ſufficient evidence before them to preſume an *actual ouſter*; and ſuppoſing there was an *actual ouſter*, in that caſe, the leſſors of the plaintiff were barred by the ſtatute of limitations. The jury found that there *was* ſufficient evidence to preſume an *actual ouſter*.

Mr. *Dunning* and Mr. *Barnes*, for the plaintiff. It is a general rule of law, that the poſſeſſion of one tenant in common, is the poſſeſſion of both; and there is no ground for any diſtinction in this caſe, ſo as to take it out of the general rule. If an *actual ouſter* had been proved, the caſe would have been different. But here, no evidence whatſoever is given of any *actual ouſter*, or of a tortious poſſeſſion: on the contrary, it appears that the poſſeſſion was only by permiſſion of his companion, and as a conſequence of ſuch permiſſion he received the rents and profits. But the bare perception of rents and profits, is no *ouſter*; and without an *actual ouſter*, the ſtatute of limitations is no bar againſt a tenant in common. To this purpoſe they cited *Reading* verſus *Royſton*, 2 *Salk.* 423. reported likewiſe in 2 Lord *Raym.* 830. *Fairclaim* ex dim. *Empſon* verſus *Shackleton*. *Eaſt.* 10 *Geo.* 3. reported ſince in 5 *Burr.* 2,604. and in 2 *Blackſtone Rep.* 690.

Mr.

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FISHAR and TAYLOR *verſus* PROSSER.

Mr. *Wallace* and Mr. *Widmore*, *contra*, for the defendants, admitted, that where there is no *ouſter*, the ſtatute of limitations does not bar the other tenant in common. But here the jury have found an *actual ouſter*, and the only queſtion is, whether they were warranted in ſo doing.—As to the caſe of *Empſon* verſus *Shackleton*, no expulſion or *ouſter* was found in that caſe; the ſingle queſtion was, whether the plaintiff was barred by the ſtatute of limitations, after a poſſeſſion of 26 years; and the court held he was not: but Lord *Mansfield* there ſaid, if a queſtion had been made at the trial, whether the plaintiff was *ouſted*, it might have been a fact to have been left to the jury. Here the queſtion was made, and the circumſtances left to the jury were ſufficient in point of law for them to preſume an *actual ouſter*; namely, an uninterrupted poſſeſſion and receipt of the rents and profits for 40 years. To this point they cited 12 *Mod.* 658, 659. 1 Lord *Raym.* 310.

Lord MANSFIELD. It is very true that I told the jury, they were warranted by the length of time in this caſe, to preſume an *adverſe* poſſeſſion and *ouſter* by one of the tenants in common, of his companion; and I continue ſtill of the ſame opinion—Some ambiguity ſeems to have ariſen from the term "*actual ouſter*," as if it meant ſome act accompanied by real force, and as if a turning out by the ſhoulders were neceſſary. But that is not ſo. A man may come in by a rightful poſſeſſion, and yet hold over *adverſely* without a title. If he does, ſuch holding over, under circumſtances, will be equivalent to an *actual ouſter*. For inſtance, length of poſſeſſion during a particular eſtate, as a term of one thouſand years, or under a leaſe for lives, as long as the lives are in being, gives no title: But if tenant *pur autre vie* hold over for 20 years after the death of *ceſtuy que vie*, ſuch holding over will in ejectment be a complete bar to the remainder man or reverſioner; becauſe it was *adverſe* to his title. So in the caſe of tenants in common: the poſſeſſion of one tenant in common, *eo nomine*, as tenant in common, can never bar his companion; becauſe ſuch poſſeſſion is not adverſe to the right of his companion, but in ſupport of their common title; and by paying him his ſhare, he acknowledges him co-tenant. Nor indeed is a *refuſal* to *pay* of *itſelf* ſufficient, *without denying* his *title*. But if, upon demand by the co-tenant of his moiety, the other *denies to pay*, and *denies his title*, ſaying he claims the whole and will not pay, and continues in poſſeſſion; ſuch poſſeſſion is adverſe and *ouſter* enough. The queſtion then is, whether the poſſeſſion in this caſe, after the death of *Stevens*,

in

in the year 1734; that is, after the particular eſtate ended, was a poſſeſſion as tenant in common, *eo nomine* or adverſe?

It is a poſſeſſion of near 40 years, which is more than quadruple the time given by the ſtatute for tenants in common to bring their action of account if they think proper; namely, ſix years: But in this caſe no evidence whatſoever appears of any account demanded, or of any payment of rents and profits, or of any claim by the leſſors of the plaintiff, or of any acknowledgment of the title in them, or in thoſe under whom they would now ſet up a right. Therefore I am clearly of opinion, as I was at the trial, that an undiſturbed and quiet poſſeſſion for ſuch a length of time is a ſufficient ground for the jury to preſume an *actual ouſter*, and that they did right in ſo doing.

* 1 Term Rep. 258. FISHAM and TAYLOR *verſus* PROCTER.

*Aſton* Juſtice. There have been frequent diſputes as to how far the poſſeſſion of one tenant in common ſhall be ſaid to be the poſſeſſion of the other, and what acts of the one ſhall amount to an *actual ouſter* of his companion. As to the firſt, I think it is only where the one holds poſſeſſion as *ſuch*, and receives the rents and profits on account of *both*. With reſpect to the ſecond, if no *actual ouſter* is proved, yet it may be inferred from circumſtances, which circumſtances are matter of evidence to be left to a jury. Now in this caſe, there has been a *ſole* and quiet poſſeſſion for 40 years, by one tenant in common only, without any demand or claim of any account by the other, and without any payment to him during that time. What is adverſe poſſeſſion or *ouſter*, if the uninterrupted receipt of the rents and profits without account for near 40 years is not?

*Willes Juſtice.* This caſe muſt be determined upon its own circumſtances. The poſſeſſion is a poſſeſſion of 16 years above the 20 preſcribed by the ſtatute of limitations, without any claim, demand, or interruption whatſoever; and therefore, after a peaceable poſſeſſion for ſuch a length of time, I think it would be dangerous now to admit a claim to defeat ſuch poſſeſſion. However ſtrict the notion of *actual ouſter* may formerly have been, I think adverſe poſſeſſion is now evidence of *actual ouſter*: and therefore entirely agree that under the circumſtances which appeared at the trial, it was very properly left to the jury to preſume an *actual ouſter* in this caſe.

*Aſhhurſt* Juſtice. I am entirely of the ſame opinion. Here is a poſſeſſion of near 40 years, without any claim by the leſſors of the plaintiff to a ſhare of the rents and profits, and without any acknowledgment of his right, by the other tenant in common.

After

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FISHER and TAYLOR *verſus* PROSSER.

After ſo long an acquieſcence I think the jury were well warranted to preſume any thing in ſupport of the defendant's title, and they might preſume, either an *actual ouſter* or a *conveyance*. With reſpect to the caſe of *Fairclaim* ex dim. *Empſon* verſus *Shackleton*, the preſent queſtion was not properly before the court in that caſe. The ſingle queſtion there was, Whether the plaintiff was barred by the ſtatute of limitations. The poſſeſſion was a poſſeſſion of 26 years; but in that caſe it was not left to the jury to preſume either an adverſe poſſeſſion or an *actual ouſter*. That fact therefore was not found, and it is not the province of the court, but of the jury to preſume facts. But here it was left to the jury, and the jury have preſumed an *actual ouſter*; and I think that after a quiet uninterrupted and undiſturbed poſſeſſion of 40 years, they were well warranted in ſo doing.

Rule for a new trial diſcharged.

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*Wedneſday, Nov.* 23d.

## REX *verſus* CARTER.

THIS was an information in the nature of a *quo warranto*, againſt the defendant, to ſhew by what authority he claimed to exerciſe the office of burgeſs of the borough of *Portſmouth*.

The information alleged, and it was admitted in the plea, that this *office* and franchiſe of a *burgeſs* has been, and ſtill is, a place, *office*, and *franchiſe* of great *truſt* and *pre-eminence* within the ſaid borough, *touching the rule and government of the ſaid borough, and the adminiſtration of public juſtice*. The plea then ſet forth, that within the ſaid borough there have been, and now of right ought to be, an *indefinite number of burgeſſes*. That by a charter, 3 *Car.* 1. the mayor, aldermen, and burgeſſes were incorporated under the name and title of the mayor, aldermen, and burgeſſes of the borough of *Portſmouth*. That the charter nominated the firſt mayor, and twelve perſons to be aldermen, and then grants "that it ſhould and might be lawful for the mayor "and aldermen, &c. or the major part of them, from time "to time, and at all times then after, for ever, when, and "as often as it ſhould appear to them to be fit and neceſſary, to "name ſo many and ſuch perſons to be burgeſſes as they ſhould "pleaſe, and to the ſaid burgeſſes, ſo choſen, to adminiſter an "oath for their faithfully executing the ſaid office of burgeſs." The plea further ſtated, that this charter was accepted by the then mayor and burgeſſes of the ſaid borough, and that the defendant

fendant on the 18th day of *May* 1751, was *elected* by the *major part* of the mayor and aldermen of the ſaid borough; and that *before* he took upon himſelf to exerciſe the place, office, and franchiſe of ſuch burgeſs, he was duly, and according to the uſage of the ſaid borough, ſworn into the ſaid office. 1774. REX verſus CARTER.

The replication ſet forth other parts of the charter, which give the corporation a power to take lands, and to make by-laws; and then ſtated, that the mayor, aldermen, and burgeſſes, or the major part of them, from time to time, ſhould have power to aſſemble themſelves annually, every *Monday* ſevennight before the feaſt of *St. Michael* the arch-angel, and name one of the aldermen to be mayor. That a court of record was appointed by the ſaid charter, to be held before the mayor, recorder, and aldermen of, &c. or any four of them; and alſo a court leet to be holden before the mayor, or recorder, or aldermen. And that the mayor and recorder, and every mayor for one year after his mayoralty, and three of the aldermen, to be choſen as aforementioned, ſhould be juſtices in the ſaid borough. That a court of *oyer* and *terminer* was alſo appointed by the ſaid charter, to be held by the mayor, recorder, and three aldermen, as aforeſaid. Laſtly, the replication ſtated that the defendant at the time of his ſuppoſed election to be a burgeſs, &c. was of the age of *five years* and *ten* months, and *no more*.

*Rejoinder.* That at the time the defendant was ſworn into the place, office, and franchiſe of one of the burgeſſes, &c. he was of the *full age* of *twenty-one* years. To this the plaintiff demurred.

Mr. *Buller, pro rege.* Upon this record there are three queſtions. 1ſt. Whether the office of burgeſs is a judicial or a miniſterial office? 2dly. If judicial, Whether an infant, ſuch as the defendant was, is eligible to ſuch an office? 3dly, If miniſterial, Whether an infant, ſuch as the defendant was, is eligible to ſuch an office?

As to the *firſt* queſtion, it is admitted by the plea, that the office of burgeſs is an office of great *truſt* and *pre-eminence, touching the rule and government of the ſaid borough*, and the *adminiſtration* of public *juſtice* within the ſame. This alone is deciſive that it is a judicial office; for every thing which relates to the adminiſtration of public juſtice is a judicial office. But beſides this, it appears by the record, that the burgeſſes are to chuſe the mayor, who is the principal officer in the borough, a juſtice of peace, judge of the court of record, of the court leet, and

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and of the court of oyer and terminer. Therefore upon these grounds it is clearly a judicial office.

II. Question. Supposing this is a judicial office, whether an infant is eligible to it? No authority can be cited to shew that he is eligible, but there are many which decide he is not. *Plowd. Com.* 379. 381.—9 *Co.* 48. 97. These authorities say, an infant seems capable of holding such offices as do not concern the administration of justice, but only require skill and diligence, such as the office of park-keeper, forester, gaoler, &c. But a distinction is made with regard to offices of confidence as this is, and which does concern the administration of justice.—In *Scambler* versus *Walter*, cited in *Cro. Car.* 556. it was held, that the grant of the office of an *under-stewardship* in possession or reversion to an infant is void; because he is incapable thereof, not having knowledge to execute it *pro commodo regis et populi.* *Co. Litt.* 3. *b.* 8. *P.*—An infant cannot be sworn on an inquest. *Co. Litt.* 157. 172. *b.*—Nor be elected a member of parliament. 4 *Inst.* 47. For all these are offices of skill and confidence, or concern the administration of justice.

Upon shewing cause against this information it was said, that it has been taken for granted ever since the case in the year book, 21 *Ed.* 4. 12. *B.* that an infant may be chosen mayor. But there the infancy of the mayor was not in question, but only whether the body corporate should avoid their own deed, on account of a defect they were well acquainted with; namely, the imprisonment of the mayor; and it was held they should.

If these two points are with the prosecutor, the third is unnecessary; but if necessary to enter into it, an infant under years of discretion, is not capable of taking a ministerial office, unless he can act by deputy; nor an office where an oath is required. He cannot be an attorney, because he cannot appoint a deputy. *March, Rep.* 31. nor be sworn; *March* 92. So with respect to other acts, or offices where an oath is required. *Co. Litt.* 3. *b.* *Cro. Car.* 556. *Co. Litt.* 65. *b.* In the present case it was necessary for the defendant to take the oaths of allegiance and supremacy, and likewise the oath of office appointed by the charter faithfully to execute all things which belong to the office of burgess. But at the time of his election, he was of such a tender age, that the law will not allow him the smallest title to discretion whatsoever, *videlicet*, *under* the age of *seven* years. At this age, an infant cannot be guilty of felony, *whatever circumstances proving discretion may appear*; for from presumption

of law, he cannot have diſcretion, and no averment ſhall be received againſt that preſumption. 1 *H. H. P. C.* 23.

Laſtly, The inconvenience and miſchief of admitting infants of ſuch an age, would be fatal to almoſt all the corporations in *England*: every borough would become a monopoly, and the inſtant an alderman's ſon had breath, he would be a burgeſs, and no others would be admitted. If one infant may be a burgeſs, others may; ſo that all, or the greater part of the burgeſſes might be infants in their cradles, by which means one integral part of the body would be loſt or at leaſt ſuſpended. The king's charter would be perverted, and the power which he had delegated to many, would be confined to the hands of a few. Many corporations would be wholly diſſolved; for no function in which the concurrence of burgeſſes was neceſſary could be exerciſed, till ſome of this body of childhood had attained the age of 21 years. In the caſe of this borough neither mayor nor juſtices during the infancy of the burgeſſes could be elected. The inconvenience of ſuſpending the powers of corporations, were ſo fully ſeen by the gentlemen on the other ſide, that on ſhewing cauſe againſt this information, it was thought neceſſary by ſome of them to contend, there was no reaſon why they ſhould not be admitted, and act during their infancy. But this I truſt is ſufficiently anſwered; for they have neither diſcretion to act, nor capacity to take oaths, both which are required by law.

Mr. *Davenport*, *contrà*. An infant is eligible to the office of burgeſs, though he cannot act till of full age.

The 1ſt objection is, that this is admitted on record to be an office of truſt and pre-eminence, and touching the adminiſtration of juſtice. As to the former part of this allegation, they are words of courſe in every information; and with reſpect to the latter, it is difficult to underſtand what is meant by *touching the adminiſtration of juſtice*. For the power of the burgeſſes to elect the mayor, or the three juſtices of peace appointed by the charter to do judicial acts, is not their adminiſtration of juſtice. The conſequence of denying it in the plea would have been, that it muſt have been tried; and then a ſpecial verdict muſt have ſtated to the court in what degree the office related to the adminiſtration of juſtice. It behoved the proſecutor therefore, in the firſt inſtance, to have ſhewn this to the court, if he meant to rely on it as a ſerious objection.

But ſuppoſing the fact to be as admitted by the plea, it does not follow that every office which affects the adminiſtration of juſtice,

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juſtice, is therefore a judicial office. The office of *ſheriff* touches the adminiſtration of juſtice, yet in many places it is hereditary, and conſequently tenable by an infant. A *ſerjeant at mace*, like every other officer of the court, is concerned in the adminiſtration of juſtice, yet his office is not judicial. Therefore every office which concerns the adminiſtration of juſtice is not a judicial office.

As to the capacity of infants to hold ſuch offices, in all caſes, where it is not requiſite for the *elected* inſtantly to execute the office in perſon, but may act by ſufficient deputy, an infant is eligible.—As to the caſe of *Scambler* verſus *Walter*, cited in *Young* verſus *Fowler*, *Cro. Car.* 556. it is in the ſame page held, that an infant is capable of holding the office of *regiſter* of the dioceſe of *Rocheſter*. It is taken for granted too in that caſe, that an infant may be *warden* of the *Fleet*: now the office of warden of the *Fleet* greatly touches the adminiſtration of juſtice. There clearly, therefore, is nothing in that objection.

The caſe in the year book, 21 *Ed.* 4. is in favour of the defendant, for it is there ſaid a corporation may elect an infant mayor. If he may be *mayor*, *a fortiori* he may be a *burgeſs*; for in this corporation he cannot be mayor without firſt having ſerved the office of burgeſs.

As to the incapacity of infants to be elected members of parliament, the *ſtat.* 7. & 8 *Will.* 3. is the firſt ſtatute which prohibits their being choſen. The only inference, therefore, is, that before that time they were eligible, otherwiſe the ſtatute was unneceſſary. With reſpect to the oath required by the charter no ſuch oath is required to be taken by a burgeſs, but only a power given to the mayor and aldermen, to adminiſter an oath; for the words are "that it ſhall and may be lawful for the mayor and "aldermen to name ſo many and ſuch perſons to be burgeſſes "as they ſhould pleaſe, and to the ſaid burgeſſes ſo choſen, to "adminiſter an oath, *&c.*"

The crown might in the original grant have nominated an infant to be mayor or burgeſs; and if ſo, thoſe to whom the right of the crown is delegated, have the ſame power. But ſuppoſing an oath were neceſſary, an infant who is choſen a burgeſs is not obliged to be inſtantly ſworn in. If he is adult at the time he takes upon himſelf to act, it is ſufficient. Perſons who are reſident abroad, and conſequently cannot be immediately ſworn in, are nevertheleſs eligible. In many corporations perſons are burgeſſes by birth. Titles by ſervitude, or marriage

of

of a burgeſs's daughter, are not unfrequent before the age of 21. And in ſome it is cuſtomary to ſwear them in, at the age of 20, as in *Newcaſtle*. In ſhort, no principle of law is more clear, than that an *inchoate* right to be a burgeſs may veſt in an *infant*, and where ſuch right does veſt, a *mandamus* will lie to ſwear him in, at the legal age of 21, or ſuch other time as cuſtom may have eſtabliſhed. No authority has been cited to the contrary; all the objections which have been made, are founded upon matter ſubſequent to the act of their being elected; but they are not ſufficient to bar the right of an infant, who has by law a capacity to take any thing which does not affect the commonwealth. In this caſe it is apparent upon the record, that there can be no neceſſity for his acting as ſoon as he is elected; for the number of burgeſſes are by the charter made *indefinite*; and if the number of infants ſhould be too great, a ſufficient number of perſons qualified to hold the neceſſary offices of the corporation, may at any time be added; conſequently no inconvenience can ariſe from infants being elected, and as there is no law againſt it, the defendant is well entitled.

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Lord *Mansfield*. A great variety of learning has been gone into on both ſides, which ſeems to me unneceſſary to be taken into conſideration upon the preſent queſtion; the deciſion of which depends upon a very ſhort point.

The argument begins as early as the time of *Ed.* 4. with mooting about the perſonal incapacity of the members of this corporation. The anſwer to all that is, it is not the act of the *perſons*, but of the *body corporate*; therefore the act is good.

Another ground of argument that has been made is, the incapacity of infants to become grantees of offices; and that there are many things intermixed with the adminiſtration of juſtice which an infant is of capacity to take by grant. But that is not the queſtion.

The next head of argument is, Whether this office of burgeſs is not an office touching the adminiſtration of juſtice. It would be a pretty nice point if it could be brought to that. But the caſe does not depend upon that queſtion. Let us ſee then what the true queſtion is. This is a corporation which derives its conſtitution under a charter from the king, and their whole power ariſes from it. It follows therefore that they are bound to act according to the powers and directions which it contains.

The queſtion then is, Whether the defendant in this caſe being elected at the age of *five* years old, and ſworn in at *twenty-one*,

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is duly elected according to the terms of the charter? The whole depends upon the true conſtruction of the charter.

Mr. *Davenport* has ſaid there may be *inchoate* rights, to be completed when the parties are of age; and caſes have been alluded to of children born with a right to be admitted at 21, on payment of a ſum of money, and alſo titles by ſervitude or marriage. Clearly there may be ſuch *inchoate* rights; but the queſtion is, Whether the king has by this charter given the corporation a power to grant *inchoate* rights to infants, to be put in execution upon their attaining the age of 21? If he has not, there is an end of the defendant's title. Let us ſee then what the terms of the charter are.

The king enables the mayor and aldermen, or the greater part of them, to chuſe as many burgeſſes as they ſhall think proper, and to adminiſter to them the oath of office, and *till ſworn* they are not *complete* burgeſſes. Upon an information they muſt be ſworn in. Did the king mean, when he directed they ſhould be ſworn in, that they ſhould ſwear in ſucking infants? It is ſaid a corporation may chuſe abſent members: if fairly, and conſiſtent with the charter, they may. But they cannot chuſe an abſent member colluſively: and in the caſe of *Cambridge*, the court was of opinion that it was a fraudulent election. There is no more in this caſe than this, that the king has given them a power to chuſe and ſwear in burgeſſes; and the queſtion is, Whether he gave them a power to grant an *inchoate* right, when no oath could be adminiſtered to them. I am clearly of opinion that no ſuch power is given by the charter.

*Aſton* Juſtice. The queſtion does not depend upon the capacity or incapacity of infants to take; but whether this corporation are empowered by their charter to grant *inchoate* rights to infants.—As to the caſe in the year book, 21 *Ed.* 4. 12. the ground upon which the court held the plea to be good was, that the bond was the act of the corporation, not the act of the mayor; and that the dureſs under which *he* acted, was the dureſs of the *whole body*: conſequently the bond was void.

In moſt charters the direction as to the election of burgeſſes is, that the mayor, &c. ſhall chuſe one or more of the *diſcreet* men of the borough, to be a burgeſs or burgeſſes. But can it be ſaid, that an infant of *five* years of age, is or can be ſuppoſed to be ſuch *diſcreet* perſon? The words of the preſent charter are, that "they may, as often as it ſhall appear to them

"to

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"to be *fit* and *neceſſary*, elect ſo many and *ſuch* perſons to be "burgeſſes as they ſhould pleaſe, and to ſuch perſons ſo choſen, "ſhall *adminiſter an oath* faithfully to execute the office." This ſuppoſes the mayor and aldermen, &c. to exerciſe their judgment in electing perſons to be burgeſſes; and in reſpect of the oath, the ELECTION and SWEARING are clearly intended to be *ſimul et ſemel*. But what is the preſent caſe? Not an *election*, but a contingent *nomination*, which perhaps might never have taken effect; becauſe the party might not have lived. Other perſons might, at ſuch a diſtance as 16 years, be to ſwear him in; diſputes might ariſe as to his being the ſame perſon, beſides involving many other inconveniencies. I am clearly therefore of opinion, upon the true conſtruction of this charter, that the act muſt be the act of the corporation for the time being, to be executed preſently by them; and that it was not intended they ſhould have a power to nominate for many years to come; ſuch nomination to be completed, if the party ſhould at ſuch future time happen to be in *eſſe*, and diſpoſed to take the office upon him.

*Willes* Juſtice. I am clearly of the ſame opinion; there never was a plainer caſe.

*Aſhhurſt* Juſtice. I think this a very clear caſe. The power which the charter gives of electing burgeſſes in this borough, is to be exerciſed when and as often as it ſhall appear to the mayor, aldermen, &c. to be *fit* and *neceſſary*. By that is meant, fit and neceſſary for the preſent purpoſes of the corporation; and the perſons intended, ſuch as are capable of taking upon themſelves the immediate execution of the office: not perſons to be nominated only, and who might or might not act, or be capable of acting in future, as circumſtances and events might turn out.

Judgment for the king.

## JONES *verſus* COOPER.

*Friday, Nov.* 25th.

THIS was an action for goods ſold and delivered at the inſtance of the defendant. Plea, *non aſſumpſit*, and verdict for the *defendant*. Upon a rule to ſhew cauſe why a new trial ſhould not be granted, the caſe appeared from the report of Mr. Juſtice *Nares*, who tried the cauſe, to be ſhortly this: The

*A parol promiſe to pay for goods ſold to B, if B. did not pay for them, though made before delivery of the goods, is a collateral undertaking within the ſtatute of frauds.*

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defendant had frequently given written orders to the plaintiff to deliver goods of different kinds to one *Smith*, her ſon-in law; in all of which ſhe undertook to be anſwerable for the payment. Theſe had been all punctually diſcharged. But the goods upon which the preſent queſtion aroſe were delivered to *Smith*, in conſequence of a *parol* order and a *parol* promiſe by the defendant in theſe words, "*I will pay you, if Smith will not.*"—That the undertaking was before the delivery of the goods; but that *Smith* was entered as the debtor in the plaintiff's books.

Mr. *Mansfield* and Mr. *Buller*, in ſupport of the rule. The ſingle queſtion is, Whether the promiſe which is the ground of the plaintiff's action, is to be conſidered as a collateral promiſe within the ſtatute of frauds; or whether it is not an original undertaking upon the credit of which the goods were ſupplied to *Smith?*

The words of the *ſtat.* 29 *Car.* 2. *c.* 3. are, "That no "action ſhall be brought whereby to charge a perſon upon any "ſpecial promiſe to anſwer for the debt or default of another, "unleſs the agreement upon which ſuch action is brought, "ſhall be in writing." This is not an undertaking for the debt of another; but an original contract upon the confidence of which the debt firſt accrued: Therefore not within the ſtatute; and ſo it was held in *Mawbrey* verſus *Cunningham*, Sittings after *Hil. Term* 1773. There goods were delivered to *A*, at the requeſt of *B*, who ſaid *he would ſee them paid for.* Lord *Mansfield* held, that as the promiſe was before delivery of the goods, it was not within the ſtatute, becauſe at the time of the promiſe there was no debt at all.

Mr. *Dunning contra.* The caſe cited, was for goods ſold at the defendant's requeſt, and a promiſe by the defendant to pay for them. No doubt if goods be delivered to *A*, upon the requeſt of *B.*, and *B.* promiſes to pay for them, they are goods ſold to *B.* But in the preſent caſe, the defendant was to pay only *in caſe Smith* (to whom the goods were ſent) did not pay for them; it is therefore a conditional promiſe. *Smith* was made debtor for them; and conſidered as ſuch by the plaintiff, and therefore he ſhould have uſed due diligence to recover againſt *Smith*, before he had recourſe to the defendant.

Lord *Mansfield.* The general diſtinction is a clear one, and upon that diſtinction the caſe which has been cited was determined. Where the undertaking is *before delivery*, and there is a direction

a direction to deliver the goods, and I will see them paid for, it is not within the statute of frauds. But there may be a nicety where the undertaking is before delivery, and yet *conditional* as this is. It turns singly upon the undertaking being *in case* the *other* did *not* pay.—We will look into it. 1774. JONES *versus* COOPER.

The next day Lord *Mansfield* delivered the unanimous opinion of the court as follows:

We are all of opinion upon the authority of the cases in the books, that the promise by the defendant in this case, to pay, if *Smith* did not, is a collateral undertaking within the statute of frauds; and it is so clear that it would only be mispending time to go through the cases, or to say much about it.

Rule for a new trial discharged.

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## REX *versus* BEACH.

THE defendant in this case had been convicted of perjury in an affidavit. Upon shewing cause why the judgment should not be arrested, exception was taken by Mr. *Dunning* and Mr. *Buller*, in support of the rule, that there appeared a material variance between the indictment and the affidavit; for in the affidavit the defendant swore, that "he understood and "believed, *&c.*" whereas the assignment of the perjury in the indictment was, "that he had falsely sworn, that he under*s*tood "and believed, *&c.*" omitting the letter *s*.

Indictment for perjury. Variance in the word underwood for under*s*tood, held not material.

In support of this exception it was insisted, that this being a variance in the material part of the charge, namely, in the assignment of the perjury itself, was fatal, and could not be cured by verdict; and cited *Queen* versus *Drake*, 2 *Salk.* 660.—*Hutton* 56. *Cro. Jac.* 133. 5 *Rep.* 45. 2 Lord *Raym.* 1224.

*Cur. advisare vult.*

Lord *Mansfield* now delivered the unanimous opinion of the court as follows. This was a motion in arrest of judgment on an indictment for perjury in an affidavit; upon the ground of a material variance between the affidavit and the indictment, the letter *s* being left out in the word understood: and it comes before the court after the jury have read it "under*s*tood." We have looked into all the cases upon the subject; some of which go to a great degree of nicety indeed; particularly the case in *Hutton* 56. where the word *indicari* was written for *indictari*; whereas it should have been written with an abbreviation *indicari*$^{s}$; but that case is shaken by the doctrine laid down in 2 *Hawk.* 239.

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REX *verſus* BLACK.

The true diſtinction ſeems to be taken in the caſe of the *Queen* verſus *Drake*, 2 *Salk.* 660. which is this; that *where the omiſſion or addition of a letter does not change the word, ſo as to make it another word, the variance is not material.* To be ſure, a greater ſtrictneſs is required in criminal proſecutions than in civil caſes; and in the former a defendant is allowed to take advantage of nicer exceptions. But this is a caſe where the matter has been fairly tried, and where the omiſſion of the letter *s* certainly does not change the word. Therefore we are all of opinion, that the jury were very right in reading it "underſtood."

Rule for arreſting the judgment, diſcharged.

*Same day.*

## GILBERT *verſus* BURTENSHAW.

In perſonal *torts*, the court will ſeldom grant a new trial for exceſſive damages.

THIS was an action for maliciouſly indicting the plaintiff for perjury.—The ſecond and third count were for defamation, in ſaying the plaintiff was a perjured knave and ſcoundrel, after acquittal, and he would prove it.

Upon ſhewing cauſe why a new trial ſhould not be granted on the ground of exceſſive damages, it appeared by the report of Lord Chief Baron *Smythe*, before whom the cauſe was tried, that his Lordſhip directed the jury, in caſe they were of opinion that there was malice, and no probable cauſe, to find a verdict for the plaintiff; but if they thought there was a probable cauſe, then to find a verdict for the defendant. The jury found a verdict for the plaintiff, damages 400*l.* and his Lordſhip reported that he was very well ſatisfied with the verdict.

Mr. *Dunning*, Mr. *Lade*, and Mr. *Morgan*, in ſupport of the rule, were inſtructed to ſay, that the acquittal upon the indictment for perjury was by miſtake, and not upon the merits: and in reſpect of the damages they inſiſted, that as no ſpecial damage was laid or proved, the ſum of 400*l.* was much too ſevere and exceſſive.

Mr. Juſtice *Willes*, who tried the indictment againſt *Gilbert* the plaintiff, explained what paſſed at that time, and ſaid, that after a trial of ſix hours it was an acquittal upon the merits, and very much to his ſatisfaction.

Lord *Mansfield*. This rule comes before the court ſingly on the judge's report.—It is not an application on the ground of ſurpriſe or of new evidence, that has been diſcovered ſince the trial; nor upon the ground, which counſel were inſtructed to mention

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mention to the court when it was firſt moved, namely, that from the hurry of ſumming up, the jury were miſled to think, that declarations accuſing the plaintiff of perjury were left to the jury, when in fact no ſuch evidence was given. By the report it appears that that ſuggeſtion is totally untrue; and that there was ſtrong evidence of ſuch declarations being made by *Burtenſhaw*, after the trial of the indictment.

The verdict is taken upon two counts: upon the firſt, "for "maliciouſly indicting the plaintiff of perjury;" and upon the ſecond, for calling him "a perjured raſcal, and ſaying he would "prove it." There was evidence in ſupport of both counts. Therefore, the whole ground of the application reſts on the point of exceſſive damages. I ſhould be ſorry to ſay, that in caſes of perſonal torts, no new trial ſhould ever be granted for damages, which manifeſtly ſhew the jury to have been actuated by paſſion, partiality, or prejudice. But it is not to be done without very ſtrong grounds indeed; and ſuch as carry internal evidence of intemperance in the minds of the jury. It is by no means to be done where the court may feel, that if they had been on the jury they would have given leſs damages, or where they might think the jury themſelves would have completely diſcharged their duty, in giving a leſs ſum. Of all the caſes left to a jury, none is more emphatically left to their ſound diſcretion than ſuch a caſe as this: and unleſs it appears that the damages are flagrantly outrageous and extravagant, it is difficult for the court to draw the line But in this caſe, where the defendant has been guilty of repeated defamation againſt the plaintiff, after a fair trial and acquittal upon a malicious proſecution, it is impoſſible for the court to go into a nice examination and admeaſurement of what ought to have been the damages.

ASTON, Juſtice.—I am clearly of the ſame opinion; and in the preſent caſe I ſhould doubt, even if it ſtood upon the ſecond count only, whether the court ought to interpoſe on account of the largeneſs of the damages, in favour of a man who has been guilty of charging another with ſo foul a crime as is there laid, and declaring in public that he would prove it upon him.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhburſt* were of the ſame opinion

Rule for a new trial diſcharged.

1774.

*Saturday, Nov 26.*

MACE *verſus* CADELL.

TROVER for goods. Upon ſhewing cauſe why the verdict given in this caſe for the plaintiff ſhould not be ſet aſide, and a non-ſuit entered; the court took time to conſider. And now Lord *Mansfield* delivered the unanimous opinion of the court as follows:

The enacting part of *ſect.* 11. *ſtat.* 21. *Jac.* 1. *c.* 19. is not reſtrained by the preamble, but extends to goods of a *third perſon*, which he permits a trader, who afterwards becomes bankrupt, to be in the *poſſeſſion of*, and *to ſell as his own*; as well as to the bankrupt's *original property*, ſo kept and diſpoſed of by him as his own, *after* having *conveyed* it to a third perſon.

The plaintiff, *Mace*, kept a public houſe, had a licence, and ſaid ſhe was married to one *Penrice*. She went to the *Exciſe-Office*, had his name entered in the books, with a note in the margin "*married.*" *Penrice* had the licence, and continued in poſſeſſion of the houſe and goods, from that time till he abſconded, and went to *Pimlico*, which was an act of bankruptcy. *Mace*, the plaintiff, firſt claimed the goods in queſtion, under a bill of ſale from *Penrice*; but afterwards as her own original property, and denied that *Penrice* and ſhe were married. *Penrice* was examined, and he ſaid that it was not till within three weeks before he went away that he knew whether he would marry her or not.

At the trial a doubt occurred to me, whether this caſe did not come within the *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 11. For the poſſeſſion which the bankrupt had of theſe goods, was emphatically a poſſeſſion of them *as his own*, and kept by him as ſuch. It was ſuggeſted, that there was a ſimilar caſe depending in the *C. B.* where the queſtion was, Whether the enacting clauſe of the eleventh ſection extends further than the preamble of that ſection, ſo as to *include goods not originally* the bankrupt's The preamble only ſays, "And for that it often falls out that many "perſons before they become bankrupts, do *convey their goods* "to other men, upon good conſideration, yet ſtill do keep the "ſame, and are reputed owners thereof, and diſpoſe of the ſame "as their own:" But the words of the enacting part are as follows: "Be it enacted, that if any perſon, at ſuch time as he "ſhall become bankrupt, ſhall, *by the conſent of the true owner*, "*&c.* have in his poſſeſſion, *&c.* any goods, *&c.* whereof he "ſhall be reputed owner, the commiſſioners ſhall have power "to ſell the ſame in like manner as any other part of the bankrupt's eſtate." Theſe words clearly extend to other perſons goods, as well as to thoſe which were originally the bankrupt's property. For the ſake of conformity, we were deſirous to

ſtay till the court of *Common Pleas* had given their opinion. But that caſe we underſtand is made up. 1774.

MACE *verſus* CADELL.

We have conſidered the general queſtion; and to be ſure there is a variety of mooting in the books without any determination.

But if the ſtatute meant to comprehend nothing more than is contained in the preamble, it means nothing at all. Becauſe even *before* the ſtatute, if a man had *conveyed* his *own* goods to a third perſon, and had kept the poſſeſſion, ſuch poſſeſſion would have been void, as being fraudulent according to the doctrine in *Twine*'s caſe, 3 *Rep.* 81. At the ſame time, the ſtatute does not extend to all poſſible caſes, where one man has another man's goods in his poſſeſſion. It does not extend to the caſe of factors or goldſmiths, who have the poſſeſſion of other men's goods merely as truſtees, or under a bare authority, to ſell for the uſe of their principal; but the goods muſt be ſuch as the party ſuffers the trader to ſell *as his own*. Therefore, upon this ground we are all of opinion, that the verdict ought to be ſet aſide.

But, in the conſideration of this general queſtion another point appeared, upon which we are equally clear; namely, that after a ſolemn declaration by the plaintiff that ſhe was married to *Penrice*, and that theſe were the goods of *Penrice* in her right, ſhe ſhall never be allowed to ſay, that ſhe was not married to him, and that the goods were her ſole property. On either ground, therefore, the verdict is wrong. If ſuch a practice were to be allowed it would be laying a trap for perſons to deal with bankrupts.

*Per Cur.* Let the verdict be ſet aſide, and a non-ſuit entered.

THE END OF MICHAELMAS TERM.

*Saturday, Jan.* 27th.

## MORGAN et UXOR *verſus* JOHN GRIFFITHS, and Others.

Deviſe to T. G. *for and during his natural life*, and after his deceaſe to *his heirs* and aſſigns for ever, *for want of ſuch heirs*, to T. E. his heirs and aſſigns for ever. T. G. has only an eſtate tail.

THIS was a caſe out of *Chancery* in ſubſtance as follows:

*Thomas Griffiths* being ſeiſed in fee of the premiſes in queſtion, by his laſt will amongſt other things gave and deviſed as follows:

"I do give, bequeath, and deviſe two parts to be divided in "three parts, of all that tenement and lands ſituate, lying, and "being within the pariſh of *Abergivilly*, and county of *Car-*"*marthen*, commonly called and known by the name of *Bwlch* "*Gwynn*, unto *Thomas Griffiths*, my grandchild, *for and during* "*his natural life*, and after his deceaſe, to his right and lawful "*heirs* and aſſigns, for ever; and *for want of ſuch lawful* "*heirs*, I do give the ſaid lands, as before expreſſed, to *Thomas* "*Evan*, ſon of *Evan Thomas*, of *Penllwyn*, the lands to his "heirs and aſſigns for ever."

The teſtator died ſoon after, without revoking or altering his ſaid will; whereupon the ſaid *Thomas Griffiths*, his grandſon, entered into poſſeſſion of the premiſes, and being ſeiſed as aforeſaid, by leaſe and releaſe of the 30th and 31ſt *January*, 1727, previous to his marriage with *Dorothy* his firſt wife, conveyed the ſame to the uſe of himſelf for life, remainder to his wife for life, remainder to the *heirs of his body* on the ſaid *Dorothy* to be begotten, remainder to his own right heirs.

*Dorothy*

*Dorothy* died, leaving *Rachael* (the wife of the plaintiff) her only child, by her ſaid huſband, who afterwards married a ſecond wife, by whom he had iſſue the defendant *John Griffiths*, and ſeveral other children, and died. 1775. Morgan verſus Griffiths.

Upon his death, the defendant *John* entered on the premiſes, claiming them as tenant in tail, under the will of his great-grandfather, *Thomas Griffiths*, the teſtator.

The plaintiff and his wife claimed under the ſettlement of *Thomas Griffiths*, her father, conceiving that he took an eſtate in fee, under the will of the teſtator, *Thomas Griffiths*, his grandfather.

*Thomas Evan*, the deviſee in remainder in the ſaid will, was another grandſon of the teſtator, and ſurvived him.

The queſtion ſubmitted by the Lords Commiſſioners, for the opinion of this court was, what eſtate the grandſon *Thomas Griffiths*, took in the premiſes by the will of the ſaid *Thomas Griffiths*, the grandfather?

Mr. *Wallace*, who was for the plaintiff, acknowledged the rule of law to be clearly ſettled; that where one deviſes to *A.* and his heirs generally, which would convey a fee, yet if there be a remainder over, for want or upon failure of ſuch heirs, to a perſon who might take the eſtate as heir, the word heirs is reſtrained to heirs of the body, and *A.* has only an eſtate tail by ſuch deviſe; conſequently in the preſent caſe the defendant was clearly entitled.

Lord MANSFIELD.—There can be no queſtion about it, and accordingly the court certified as follows:

Having heard counſel on both ſides, and conſidered the above caſe, we are of opinion that the grandſon *Thomas Griffiths* took an eſtate tail in the tenement, called *Bwlch Gwynn*, by the will of the ſaid *Thomas Griffiths*, the grandfather.

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## ROE ex dim. BOWES *verſus* BLACKETT.

*Tueſday, Jan. 31ſt.*

To make a deviſe of lands without any limitation a fee, ſuch a manifeſt intention muſt appear that the teſtator meant to give a fee, as may ſatisfy the conſcience of the court, in pronouncing it ſuch. If it is barely problematical, the rule of law muſt take place.

IN ejectment for certain lands ſituate in the townſhip of *Newnham*, in the County of *Northumberland*, the jury found a ſpecial verdict, ſtating in ſubſtance as follows: that *Chriſtopher Blackett* was ſeiſed of the tenements, with the appurtenances, in the declaration mentioned, in his demeſne, as of

fee;

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fee; and was likewiſe poſſeſſed of ſeveral lands and tenements held by him under leaſes for years, lying contiguous to the ſaid freehold tenements; and which ſaid leaſehold lands and tenements were deviſed along with the ſaid freehold tenements without diſtinction, to the ſeveral occupiers thereof, who enjoyed the ſaid leaſehold and freehold tenements, *without knowing or inquiring which were leaſehold and which were freehold*: and being ſo ſeiſed on the 24th day of *Auguſt*, 1738, he made his laſt will and teſtament in writing, duly executed and atteſted to paſs real eſtates, and thereby deviſed as follows: "I give, "bequeath, and deviſe to my dearly beloved wife, *Elizabeth* "*Blackett*, all my freehold and leaſehold meſſuages, houſes, "lands, and tenements, ſituate at *Newnham*, in the county of "*Northumberland*, and elſewhere, and all my eſtate and inter- "eſt therein, *for and during her natural life*; and I do hereby "conſtitute and appoint *John Foſter*, of *Eddeſton*, in the ſaid "county of *Northumberland*, Eſquire, truſtee for my ſaid wife "during her natural life aforeſaid; and from and after her de- "ceaſe, I give, deviſe, and bequeath, the ſaid meſſuages, houſes, "land, and tenements, to my ſiſters in law Mrs. *Elizabeth* "*Smart*, and Mrs. *Martha Maria Bellaſyſe*, of *Haughton upon* "*Skien*, in the county of *Durham*, as *tenants in common: But* "*in caſe my mother Mrs. Alice Bellaſyſe, ſhall give or cauſe to be* "*given. any diſturbance or moleſtation to my ſaid wife, about the* "*poſſeſſion and enjoyment of my ſaid meſſuages, houſes, lands, and* "*tenements, then my mind and will is, that the ſame ſhall go to* "*my kinſman William Blackett, of the town and county of New-* "*caſtle upon Tyne, his heirs and aſſigns for ever: and I give and* "*bequeath the ſaid meſſuages, houſes, lands, and tenements, to* "*him accordingly, and do make him my* SOLE *heir thereof.* And "my mind and will further is, and I do hereby *charge* and "make chargeable my ſaid eſtate, with the *payment* of all my "juſt *debts* and funeral expences, and order the ſame to be "paid out of the *yearly profits* of my ſaid eſtate, *by my* ſaid *wife*. "And I do further give and deviſe all my perſonal eſtate what- "ſoever, to my dearly beloved wife aforeſaid, and do hereby "make her *ſole executrix* of this my laſt will and teſtament."

That the teſtator died on the 27th *Auguſt*, 1738, without iſſue, leaving *John Blackett*, ſince deceaſed, father of the defendant *John Blackett*, his heir at law. *Elizabeth Blackett*, the teſtator's widow, immediately after his death entered on the premiſes. That *Martha Maria Bellaſyſe* intermarried with *Richard*

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*Richard Bowes*, who purchaſed the reverſion of the one undivided moiety of the premiſes of *Elizabeth Smart*; and being ſo ſeiſed died inteſtate, leaving *Thomas Bowes* the leſſor of the plaintiff, his heir at law. That afterwards, on the 13th *July*, 1767, *Martha Maria Bowes*, widow of the ſaid *Richard Bowes*, died ſeiſed of the reverſion of the aforeſaid moiety of the premiſes, upon whoſe death the ſame deſcended to the ſaid *Thomas Bowes*, the leſſor of the plaintiff. That at the time of the teſtator's death, the ſaid teſtator was of the age of 27, the ſaid *Elizabeth Blackett*, his widow, of the age of 34, *Elizabeth Smart* of the age of 22, and *Martha Maria Bellaſyſe* 18. That the defendant was heir at law of the teſtator. The queſtion was, whether the half-ſiſters took an eſtate for *life* or in *fee?*

This caſe was argued twice; firſt in *Michaelmas* term by Mr. *Chambre*, for the plaintiff, and Mr. *Davenport*, for the defendant; and again in this term by Mr. *Wilſon*, for the plaintiff, and Mr. *Dunning*, for the defendant. For the plaintiff it was argued that the half-ſiſters took a *fee*. 1ſt, The fact found by the ſpecial verdict of the freehold and leaſehold lands, being ſo intermixed as to be undiſtinguiſhable by the tenants, and being coupled by the teſtator in the ſame deviſe, clearly ſhews his *intention* was to diſpoſe of *all* his eſtate. His two half-ſiſters were nearer of kin to him than his heir at law; his diſpoſition, therefore, to them was but reaſonable, and if his intention to do ſo is apparent, the court will carry it into execution, though there are no technical words. The circumſtances that ſhew he meant his ſiſters ſhould take a fee are, that having firſt charged this eſtate with the payment of his debts, he makes this material diſtinction between the two bequeſts; he directs his *wife* to pay only out of the *rents* and *profits*, but leaves it a *groſs charge* in the deviſe to his *ſiſters*. Now it is an eſtabliſhed rule of law, that where a groſs ſum is charged, though there are no words of limitation, the deviſee ſhall take a fee, for otherwiſe he might reap no benefit from it; but where it is payable out of rents and profits it is only an eſtate for life; 2dly, Where a man uſes no words of limitation, it is reaſonable to preſume that he meant more than an eſtate for life; eſpecially where in the immediate precedent deviſe, meaning to give his wife an eſtate for *life only*, he expreſsly ſays, "*for and during her natural* "*life.*" But further, the fee of the *leaſehold* clearly paſſes without any limitation at all; and therefore the freehold muſt paſs too, or the manifeſt intention of the teſtator to unite the whole would

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would be frustrated. Again, the words, "*All my estate and interest therein*," are material; for no doubt, the testator had some meaning in making use of them; but if applied to the life estate to his wife, they are nugatory; they are equally so in respect of the devise to *William Blackett*, because of the additional words "*his heirs for ever*:" Therefore the only way of giving sense to this expression, is by transposing them, or considering them as repeated, in the devise to his sisters. Lastly, it is plain that he did not intend his heirs should take in any event, for in case of disturbance by the mother, he gives the estate over to *William Blackett*. The natural inference from this is, that he hoped to prevent any disturbance from the mother by making the daughters suffer in consequence of it. But if the devise to them is construed an estate for life, it would be punishing his heir, which certainly could never be his intention in inserting that clause, if he had meant his heir should receive any benefit.

For the defendants *contra*. An heir at law shall not be disinherited without express words, or a clear and manifest intent apparent upon the face of the will. A *conjectural* intention is not sufficient, nor an intention which the court may suppose the testator ought to have had, if it is not supported by a necessary implication. Therefore there must either be words of limitation or something in the will tantamount; but those *tantamount* words must be *clear*. In this case there are no words of limitation, nor is there any thing to supply them, so as to satisfy the court even of a probable intention to give more to the half-sisters than an estate for life. But conjecture and probability are not sufficient.

Afterwards, on *Friday* the 3d of *February* in this term, Lord *Mansfield*, after stating the case, delivered the opinion of the court as follows.

The question arising out of these facts stated in the special verdict, and which is reserved for the opinion of the court, is, "Whether the estate given to the sisters in law, as tenants in "common, is an estate for life or in fee."

There are no words of limitation added to this devise; and therefore it is clear by the rule of law, that it is only an estate for life, unless it can be found from the whole of the will taken together and applied to the subject matter of this devise, that the testator's intention was to give a fee. Indeed, if from the whole of the will so taken together and applied to the subject matter it can be collected that the testator meant to give a fee;

it has been very properly, and very truly admitted at the bar, that it ought to be ſo conſtrued in order to give effect to ſuch intention. 1775. Bovey ver. Blagg etc.

Several arguments have been uſed to ſhew that ſuch intention may be collected in this caſe. In the firſt place, ſtreſs is laid on the circumſtance of its being found by the ſpecial verdict, that the teſtator's lands were partly freehold and partly leaſehold; that they lay contiguous to and intermixed with each other, ſo much ſo, that even the tenants did not know how to diſtinguiſh them: and yet that the teſtator has included both indiſcriminately in the deviſe in queſtion. From thence it is argued, and I think fairly, that the teſtator meant his freehold and leaſehold property ſhould go together. But if that be ſo, it is inſiſted further, that this deviſe, though without words of limitation, will carry the *fee ſimple of both*. For it would clearly paſs the fee of the *chattels* if they ſtood *alone*; and, therefore, conſiſtent with the intention of the teſtator to unite the whole of his property and make it *one* eſtate, it muſt be conſtrued to paſs the *freehold* too. But that argument turns in a circle; for it may as fairly be argued, that the deviſe of the freehold, which without words of limitation is by law an eſtate for life only, ſhould carry the leaſehold after it.

The ſecond argument is, that "he has charged this eſtate with "the payment of his debts;" and that where an eſtate is given to *J. S.* on condition of his paying a groſs ſum of money, it is a fair inference from the burthen impoſed upon him, that the teſtator intended him in all events a benefit; which can only be certain from his taking a fee. But that argument does not hold in the preſent caſe; for though the eſtate is charged with the payment of debts; yet here they are ordered to be paid out of the rents and profits, by his wife, who was a young woman of 34. No certain inference, therefore, can be drawn from thence.

The third argument is drawn from the words which follow the deſcription of the meſſuages preceding the deviſe to the wife for life; namely, "all my eſtate and intereſt therein," and from thence it has been inſiſted, that no words of limitation were neceſſary. But theſe words added precedent to an eſtate for life, can have no meaning at all; and it is remarkable that they are left out in the deviſe to his half-ſiſters, which ſhews the teſtator meant nothing by uſing the expreſſion in the deviſe to his wife.

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These are the several observations that have been made; from whence it has been argued, that the testator's intention was to give his half-sisters a fee. But I am not able to find in this will, any circumstances sufficiently certain to satisfy my mind that the testator really meant a fee. As to the clause of disturbance by the mother, and the devise to *William Blackett* thereupon, I am very doubtful upon conjecture, whether the testator's idea was barely to give *William Blackett* his estate, in case of an effectual disturbance, and to give him a fee upon that contingency only. For in that case it must have happened during the wife's life; it must have happened, therefore, before the estate could have gone to the half-sisters. The words are however very incorrect and inaccurate; and it is strange that barely on that contingency, depending upon the act of the mother, he should make a fee depend. I rather think his own intention might be this—To make his kinsman, *William Blackett*, his heir in reversion, after his half-sisters; but in case of disturbance, that then he should take it immediately in possession, and not in reversion, which seems to be the reason of his saying "I make "him my *sole* heir thereof." But I am not satisfied in my own mind, that even that is the right construction, and, therefore, say it merely upon conjecture. It is however enough for our judgment that the construction is doubtful; for, in order to make a devise of lands *without any limitation* added, a fee, such an intention must appear as is sufficient to satisfy the conscience of the court in pronouncing it such: if it is barely problematical, the rule of law must take place. No inference in this case is to be drawn, the one way or the other, from the circumstance of the testator's knowing how to give, for that does not appear.

Therefore, it being very doubtful whether the testator did mean a fee, or not, our determination must go by the rule of law, namely; that there being no words of limitation, the half-sisters take an estate for life only, and consequently there must be judgment for the defendant.

Judgment for the defendant.

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## REX *verſus* KEMPSON.

*Wedneſday, Feb. 1ſt.*

In a conviction it is ſufficient if enough appears, to ſhew that the evidence was given in the preſence of the defendant; without ſtating that he was actually preſent at the time.

THE defendant had been convicted in ſeveral penalties upon the *game laws*. In the conviction the appearance of the defendant and the evidence were ſet forth as follows:

Afterwards upon the aforeſaid day, and in the year aforeſaid, he, the ſaid *Samuel Kempſon*, having been duly ſummoned, appeareth, and is there *preſent* before me in order *to make his defence* againſt the ſaid charge and information, and having *heard* the ſame is aſked by me the ſaid juſtice, if he can ſay any thing for himſelf, why, *&c.* Who pleadeth that he is *not guilty* of the ſaid offence; nevertheleſs, on the ſaid 14th day of *September*, one credible witneſs, *Richard Cratorn*, now cometh before me, the ſaid juſtice, *&c.* and upon his oath depoſeth and ſaith, that on *Wedneſday* the 14th day of this inſtant *September*, he *ſaw Samuel Kempſon*, *&c. &c.* and thereupon the ſaid *Samuel Kempſon*, before me the ſaid juſtice, by the oath of one credible witneſs aforeſaid, according to the form of the ſaid ſtatute aforeſaid, in ſuch caſe made and provided is convicted of the ſaid offence, *&c.*

Upon the record being removed by *certiorari*, Mr. *Chambre* objected, that it did not appear upon the face of this conviction, that the *evidence* was given *in the preſence of the defendant*, which it ought to be, that the party accuſed may have an opportunity of croſs-examination.

Mr. *Poole*, *contra*, inſiſted that it was not neceſſary to ſtate that the evidence was given in the preſence of the party accuſed. It is ſufficient if it appears from what is ſtated that he was preſent at the time. Now here it is ſtated that the defendant appeared, pleaded not guilty, and then the evidence was gone into; in ſuch a caſe the court will preſume that he was preſent at the time, and cited *Rex* verſus *Aiken*, 3 *Burr.* 1785, as in point.

*Aſton* Juſtice. Enough appears upon this conviction, to ſhew that the witneſs was examined in the preſence of the defendant. It muſt be ſuppoſed that all that paſſed was at one and the ſame time.

*Per Cur.* Let the conviction be affirmed.

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*Friday, Feb.* 3d.

## HUNT *verſus* COPE.

In replevin upon a diſtreſs for rent, plea in bar, that the defendant *pulled down a ſummer-houſe*, whereby the plaintiff *was deprived of the uſe* thereof; without ſaying that he was *expelled* or put out of the ſame, is inſufficient; being a mere *treſpaſs*, but *no eviction*.

ERROR from a judgment of the court of *King's Bench*, in *Ireland*, in an action of *replevin*, brought by the plaintiff, now defendant in error, for taking certain goods of the ſaid *Henry Cope*, out of his dwelling-houſe, and detaining them, *&c.*

The defendant, the now plaintiff in error, avowed the taking for rent arrear due by the ſaid *Cope* to the ſaid defendant, for certain premiſes in the avowry mentioned.

The plaintiff pleaded 1ſt, That there was not any rent due to the defendant out of the premiſes, at the time of the taking, *&c.* upon which iſſue was joined. 2dly, That long before the taking of the goods, to wit on the 1ſt of *April* 1770, the defendant with force and arms unjuſtly and unlawfully entered upon the garden part of the meſſuage or tenement in the plaintiff's poſſeſſion, and did then and there with like force and arms unjuſtly and unlawfully *break* and *pull down* the roof and ceiling of a *ſummer-houſe*, part of the ſaid premiſes, and tore up the benches therein, by means whereof the plaintiff had been *deprived of the uſe* of the ſummer-houſe, from the ſaid 1ſt of *April*, 1770, until the day of taking of the ſaid goods, *&c.*

To this plea the defendant demurred, and the plaintiff joined in demurrer.

The Court of *King's Bench* in *Ireland*, gave judgment upon the demurrer for the plaintiff, whereupon the defendant brought this writ of error to reverſe the judgment, and aſſigned the general errors, and the plaintiff joined in error.

Mr. *Dunning*, for the plaintiff in error, ſtated the queſtion to be, Whether the facts ſet forth in the plea amounted to an eviction of the defendant? If not, which he contended they did not in this caſe, they were no ſuſpenſion of the rent, but a mere treſpaſs, and cited *Sir Thomas Jones*, 148. *Roper* verſus *Lloyd*, as in point; where, in covenant for non-payment of rent, the leſſee pleaded, that the plaintiff had *taken away a pent-houſe*, fixed to the premiſes, and the court held it a treſpaſs only, and no ſuſpenſion.

Mr. *Norton*, *contrà*, inſiſted that the facts in the plea did amount to an eviction; for here an actual entry by the leſſor is ſtated, and alſo that he pulled down part of the ſummer-houſe and the benches, ſo as entirely to deprive the leſſee of the uſe

of

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of it: and cited 1 *Rol. Abr.* 940. *tit. extinguiſhment*, letter *N. pl.* 1. *Cro. El.* 341. the reaſoning of which caſes he ſaid went to ſhew, that wherever there is a *tortious* entry by a leſſor, ſo as to deprive the leſſee of the enjoyment of the premiſes, it amounts to a ſuſpenſion of the rent.

Lord *Mansfield.* The whole queſtion in this caſe turns upon the pleading; for the rule of law is clear, namely, that to occaſion a ſuſpenſion of the rent, there muſt be an eviction or expulſion of the leſſee. But here the plea ſtates merely a treſpaſs, and no eviction, therefore the plaintiff muſt recover.

*Aſton* Juſtice. I am clearly of the ſame opinion. The caſe in *Cro. El.* 341. never received a final determination; and even upon the mooting of it *Fenner* and *Clench* doubted. All the caſes in the books ſuppoſe the leſſee to be put out of poſſeſſion; therefore merely ſaying that he was deprived of the enjoyment of the premiſes is not ſufficient, but he muſt plead that he was evicted. 1 Lord *Raym.* 370. *Clayton* 34. *Hob.* 326. *Reynolds* verſus *Buckle.*

Lord *Mansfield.* The defendant certainly ſhould have pleaded *eviction*, and then the facts that are now ſtated might have been ſufficient for the jury to have found a verdict in his favour.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

Judgment reverſed.

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## DOE ex dim. CHENY *verſus* BATTEN.

*Monday, Feb.* 13th.

THIS was an ejectment brought by the plaintiff, againſt the defendant, to recover ſome warehouſes in *London.* The action was tried before Lord *Mansfield*, at the ſittings in laſt term, at *Guildhall.* At the trial the caſe appeared to be ſhortly thus:

The defendant was tenant at will to the leſſor of the plaintiff, who, to determine the tenancy, gave notice at *Lady-day* to the defendant to quit at *Michaelmas.* The defendant not quitting at *Michaelmas*, the plaintiff brought this ejectment, and laid the demiſe on the 30th of *September:* the defendant appeared, and pleaded. Sometime after the plea was put in, the leſſor of the plaintiff received of the defendant a quarter's rent, due at *Chriſtmas.* The defendant's counſel inſiſted that this ſubſequent acceptance of rent ſubſequently due, was a waiver of the notice,

The *mere acceptance of rent* by a landlord, for occupation *ſubſequent* to the time when the tenant ought to have quitted according to the *notice* given him for that purpoſe, is *not of itſelf* a *waiver* on the part of the landlord of ſuch *notice* but matter of *evidence* ONLY to be left to the jury, under the circumſtances of the caſe.

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and *tantamount* to an agreement, that the defendant ſhould continue tenant. His Lordſhip ſaid, he took the practice to be ſo; though in his own opinion it was unreaſonable. But being ſettled, he directed the jury to find for the defendant, which they accordingly did. Afterwards in the ſame term Lord *Mansfield* ſaid, he had turned the matter in his mind, and likewiſe mentioned it to the judges, who doubted if the law was as he had directed. It was therefore proper the point ſhould be ſettled, for which purpoſe his lordſhip deſired Mr. *Dunning* would move for a new trial. He accordingly did, and now in this term the caſe was argued by Mr. *Mansfield* and Mr. *Bolton*, for the defendant; and by Mr. *Dunning* and Mr. *Davenport*, for the plaintiff; when the court gave judgment as follows:

Lord *Mansfield*. This caſe has been extremely well argued on both ſides. It was underſtood on all hands at the trial, that there had been a generally conceived notion and practice, that where a landlord receives rent for the occupation ſubſequent to the time when the tenant ought to have quitted according to his notice, it is an admiſſion by the landlord, that he was his tenant after that time, and conſequently a waiver of the notice. When this was mooted at the trial, I did not think there were any caſes againſt the practice, but looked upon it as eſtabliſhed; and therefore I directed the jury to find a verdict for the defendant. At the ſame time I was ſtrongly of opinion that the practice was unreaſonable and derogatory to juſtice. And now upon examination it does not appear that we are precluded by authority, or any eſtabliſhed practice, from judging agreeable to the reaſon of the caſe.

It being clearly proved that a quarter's rent accrued ſince the demiſe, the queſtion is, Whether ſufficient matter appeared in point of law, to prevent the leſſor of the plaintiff from recovering in this ejectment? If there did not, the direction I gave was wrong. Firſt, if the matter which appeared ought to have been left as a *fact*, for the conſideration of the jury, in that point of view, it was erroneous: And ſecondly, if it be clear that in law the leſſor of the plaintiff was not *barred*, it was ſtill more erroneous. An ejectment is a moſt beneficial remedy for the recovery of lands. It is a remedy by fiction of law; and therefore ſhould be applied to the purpoſes that will beſt anſwer the ends of juſtice. In ejectment the plaintiff in his declaration ſtates, that on ſuch a day he had title to the poſſeſſion of ſuch lands, and upon the trial he is bound to prove that ſuch title was

in him at the time ſo ſpecified. The title of the plaintiff in this caſe accrued by giving ſix months notice to the defendant to quit; which it was in proof had been duly given: indeed there is no diſpute, but that at the time the demiſe is ſtated to have been made, the leſſor of the plaintiff had a right to the poſſeſſion; and ſo he had at the time of the plea pleaded. The ſingle queſtion is, Whether the landlord has, by any ſubſequent act or agreement, waived ſuch his right, and conſented that the tenant ſhould continue the poſſeſſion? If he has, no doubt but he will be bound by ſuch agreement. As to that, the fact in this caſe is, that the landlord has received rent *eo nomine* for a quarter of a year, which became due after the time of the demiſe in the declaration laid. This circumſtance, it is inſiſted, is in fact a declaration on his part, that he departs from the notice he had given; and is an acknowledgment that he ſtill conſiders the defendant as his tenant. But let us ſuppoſe the landlord had accepted this rent under terms, or made an expreſs declaration that he did not mean to waive the notice, and that, notwithſtanding his acceptance or receipt of the rent, he ſhould ſtill inſiſt upon the poſſeſſion. Or ſuppoſe any fraud or contrivance on the part of the tenant in paying it. Clearly under ſuch circumſtances the plaintiff ought not to be *barred* of his right to recover: But all theſe are facts which ought to be left to the conſideration of the jury.

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The queſtion therefore is, *quo animo* the rent was received, and what the real intention of both parties was? If the truth of the caſe is, that both parties intended the tenancy ſhould continue, there is an end of the plaintiff's title: if not, the landlord is not *barred* of his remedy by ejectment: as where the leſſor of the plaintiff, after the time laid in the demiſe, agreed to accept the ſingle inſtead of the double rent, which by the *ſtatute* 4 *Geo.* 2. *c.* 28. he was entitled to. This very point was determined in a caſe of *Gilder* ex dim. *Gilder* or *Gildoe*, verſus at *Saliſbury* aſſizes, 1754, before the preſent Lord Chief Baron (then Mr. Baron) *Smythe*. There the ſingle rent had been received by the landlord ſubſequent to the time of the demiſe laid; and the objection now inſiſted on, was made: but Mr. Baron *Smythe* over-ruled it. A caſe was afterwards reſerved for the opinion of *B. R.* when the court held it to be no *bar*; and that it ought not to preclude the plaintiff from recovering in ejectment. Lord Chief Baron *Smythe* and Mr. Juſtice *Gould* both remember this caſe. I entirely agree with that opinion. The

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ſtatute gives double rent if the tenant continues in poſſeſſion after notice to quit. But ſtill it is to be received as rent. What then is the caſe where a landlord accepts the *ſingle* rent only. The taking *half*, when he is entitled to an action for the whole, is an act of lenity; but it does not import a conſent that the tenant ſhall continue in poſſeſſion, or a waiver by the landlord, of his remedy by ejectment.

There is another caſe which was tried at *Launceſton* aſſizes, when Mr. Juſtice *Gould* was at the bar. The objection taken in that caſe was, that the leſſor of the plaintiff in ejectment, had likewiſe brought an action for uſe and occupation of the very ſame premiſes, for rent which had accrued ſubſequent to the time of the demiſe. This action ſtood ready for trial at the ſame aſſizes. In arguing the objection which is now made, it was ſaid, that the action was an action founded on promiſes, and a ſuppoſed permiſſion by the plaintiff to the defendant to occupy; therefore an acknowledgment on the part of the plaintiff that he was his tenant; and conſequently a waiver of his notice. But the objection was over-ruled: and the plaintiff recovered, firſt in the ejectment, and afterwards in the action for uſe and occupation. It was holden, that one of the remedies was not a waiver of the other. Why? Becauſe they were brought for ſeveral demands, to both of which the plaintiff was entitled; conſequently, the one could be no waiver of the other; for after recovery of the poſſeſſion, the plaintiff was entitled to the profits for uſe and occupation, if he thought fit to ſue for them. Therefore in point of law the mere acceptance of rent is not in itſelf a bar.

But if there were a doubt whether the poſſeſſion was by fraud, or in conſequence of a new agreement, or whether the acceptance of the rent was mutually intended or underſtood as a waiver of the notice, that is a fact which ought to be left to the jury to determine. It was not left in this caſe; and therefore I think there ought to be a new trial.

*Aſton* Juſtice. There is no doubt but that at the time of the demiſe laid, the leſſor of the plaintiff had a clear right to the poſſeſſion.

The queſtion is, Whether he has done any ſubſequent act which amounts to a waiver of that right? The only act which appears is, the acceptance of a ſingle quarter's rent accrued ſince. I think that is only a waiver of his right to *double* rent under the *ſtat.* 4 *Geo.* 2. and does not neceſſarily imply a conſent that

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that the tenancy ſhould continue. Where an ejectment has been brought on the *ſtat.* 4. *Geo.* 2. *c.* 28. *ſect.* 2. for the forfeiture of a leaſe, there being half a year's rent in arrear, and no ſufficient diſtreſs on the premiſes; there, acceptance of rent afterwards by the landlord, has, I believe, been held a *waiver* of the *forfeiture* of the *leaſe*; which may well be; for it is a *penalty*, and by accepting the rent, the party waives the *penalty*. But this caſe is very different. For here the acceptance of *ſingle* rent, is only a waiver of his right to *double*. Therefore, I am of opinion that a new trial ought to be granted.

WILLES Juſtice. I am of the ſame opinion.

ASHHURST Juſtice. I believe there have been many nonſuits upon this objection. But hitherto the queſtion has not been much agitated: it being rather taken for granted that the practice was ſo: and, therefore, till now, the matter does not ſeem to have been ſufficiently examined or explained. Whether the acceptance of rent after the time laid in the demiſe, is or is not a waiver of the notice, depends upon the *intention* of the parties; which is a matter of *fact*, and, therefore, to be left to the jury. If the landlord accepts it only as a compenſation for the *double* rent, which the ſtatute ſays he ſhall have a right to, it is a waiver of that only: but it does not waive his right to the poſſeſſion of the premiſes, which is entirely a diſtinct and different thing. Therefore I concur in opinion, that the verdict in this caſe ought to be ſet aſide, and a new trial granted.

*Per Cur.* Let the rule for a new trial be made abſolute.

THE END OF HILARY TERM.

# EASTER TERM

## 15 GEORGE III. B. R. 1775.

Thurſday, May 4th.

### REX *verſus* VARLO, Mayor of Portſmouth.

UPON ſhewing cauſe why an information in nature of *quo warranto* ſhould not be granted againſt the defendant, to ſhew by what authority he claimed to exerciſe the office of mayor of the borough of *Portſmouth*, the conſtitution of the borough, as far as reſpected this queſtion, was admitted on both ſides to be as follows :—That the corporation was a corporation by preſcription, and alſo by charter of *Car.* 1. and conſiſted of a mayor, twelve aldermen, and an indefinite number of burgeſſes; and the mode of electing the mayor, as preſcribed by the charter, was as follows: that the mayor, aldermen, and burgeſſes, *or the greater part of them*, ſhould from time to time have a power of aſſembling themſelves, *or the greater part of them*, at and ſhould there continue till they *or the greater part of them* then there aſſembled, ſhould chuſe one of the aldermen to be mayor.

The election of the defendant was by a majority of the mayor, aldermen, and burgeſſes aſſembled; but the mayor, aldermen, and burgeſſes ſo aſſembled, did not conſtitute a majority of the whole corporation.

The queſtion was, Whether upon the true conſtruction of the words of the charter, a majority of the mayor, aldermen, and burgeſſes only, who were aſſembled, or whether a majority of the major part of the whole corporate body, ought to concur in the election of a mayor?

Serjeant

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Serjeant *Davy*, and Mr. *Wallace*, who ſhewed cauſe, ſtated that there were but five inſtances from the year 1597, to the preſent time, where a majority of the whole body were aſſembled at the election of a mayor: conſequently if the objection now made ſhould prevail, the corporation muſt be diſſolved. But this is the firſt time ſuch an objection was ever made in the caſe of an *indefinite* number of electors, and if good, may affect moſt of the corporations in the kingdom. The diſtinction is, that where the election is by the commonalty at large, thoſe who are aſſembled have a right to elect, though they do not conſtitute a majority of the whole body; and thoſe who are abſent are virtually repreſented by thoſe who are preſent. But if the number of electors be *definite*, as in the caſe of *Rex* verſus *Grimes*, capital burgeſs of *Yarmouth* *, there the majority of the whole body muſt firſt meet, and then the major part of thoſe ſo aſſembled may elect. And ſo the court held in that caſe, but ſaid it would have been different if the number of burgeſſes had been indefinite, and cited the caſe of the pariſhioners of *Wallingford*, cited by *Tanfield*, Chief Baron, in *Lane* 21. reported likewiſe in 6 *Vin. Abr.* 269 *pl.* 5.—*The Queen* verſus *Lock*, *Vin. Abr.* ſame page, *pl.* 8. where it was held, that if an act is referred to *be done by the commonalty*, there the majority of thoſe who are preſent will determine and bind the reſt.

* Since reported in 5 *Burr.* 2598.

Lord MANSFIELD. If in the ſpace of 170 years there have been but five elections by a majority of the whole body, and ſuch majority is neceſſary, the corporation muſt be diſſolved, unleſs the capital burgeſſes have been in poſſeſſion of their franchiſes for 20 years. But even then they are liable to an information filed by the *Attorney General*.

Mr. *Bearcroft*, Serjeant *Glynn*, and Mr. *Davenport*, *contra*, admitted, that where a power is given to any deſcription of perſons, ſuch as mayor, aldermen, and burgeſſes *generally*, to do an act, there it is competent to the major part of thoſe who are preſent to do ſuch act; but inſiſted that that was not this caſe: for here the charter moſt clearly meant there ſhould be no election of a mayor, but by a majority of the major part of the conſtituent members, ſpecified and impowered by the charter to elect. The words are, "that the mayor, aldermen and burgeſſes, *or the greater part of them*, ſhall, from time to time, "have power, upon ſuch a day to aſſemble *themſelves*, or *the* "*greater part of them*." Who are to aſſemble themſelves by this direction? At leaſt *the greater part of* the whole body? And

1775. And the ſubſequent direction is, that they ſhall there continue till they, or the greater part of them, then there aſſembled, ſhall chuſe one of the aldermen to be mayor, &c. therefore, there muſt be a majority of the conſtituent body aſſembled.

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As to the uſage, if the words of the charter were doubtful, the uſage under it might be evidence to explain the meaning of them. But here the terms of the charter are clear and expreſs, and, therefore, the corporation muſt conform to them. As to the conſequences that may enſue from the few inſtances in which the directions of the charter have been purſued; they are no ground for the court to refuſe an information; for if the words are clear, juſtice muſt be done, though it involve the diſſolution of the corporation, and inſiſted on *Rex* verſus *Grimes* as a caſe in point.

Lord MANSFIELD. Upon the words of the charter alone, I myſelf have no doubt about the conſtruction of it. In this corporation there are an indefinite number of freemen; and it is a corporation in which honorary freemen may be made.

It is in the nature of all corporations to do corporate acts; and where the power of doing them is not ſpecially delegated to a particular number, the general mode is, for the members to meet on the charter days, and the major part who are preſent do the act. But where there is a ſelect body it is a different thing, for there it is a ſpecial appointment. All the reaſoning therefore is different.

But ſuppoſe the words of the charter are doubtful, the uſage in this caſe is of great force; not, that uſage can overturn the clear words of a charter: but if they are doubtful, the uſage under the charter will tend to explain the meaning of them; eſpecially in a caſe like this, where, before the charter, the corporation conſiſted of an indefinite number of burgeſſes by preſcription, and where the charter itſelf added no new members, but only incorporated the old ones. Since the charter, namely, for theſe laſt 170 years, the major part of thoſe only who were aſſembled, have concurred in electing the mayor; and there are but five inſtances during that period, in which the members ſo aſſembled have conſtituted a majority of the whole body. My only doubt at preſent is, whether it ought not to be put upon the record if the parties are deſirous to try the queſtion, and to be at the expence; and therefore I think the rule ſhould be made abſolute in one, and enlarged as to the reſt.

ASTON

ASTON Juſtice. In the caſe of an indefinite number of burgeſſes, as there are in this corporation, I cannot conceive that the charter meant a majority of that indefinite number ſhould be preſent. 1775. REX verſus VARLO.

The uſage anterior to the charter of *Car.* 1. cannot alter the charter, but it will guide the conſtruction in a caſe where it does not plainly appear that the charter meant to vary ſuch former uſage. Therefore I concur with my lord, that the rule ſhould be abſolute as to one.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* concurred.

Lord MANSFIELD. The uſe of a trial will be to find the uſage.

Rule abſolute in one.

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DRINKWATER and another, Aſſignees of DOWDING, *verſus* GOODWIN. *Friday, May 14th.*

A factor who becomes ſurety for his principal, has a lien on the price of the goods, ſold by him, for his principal, to the amount or the ſum for which he has ſo become ſurety.

THIS was an action brought by the plaintiffs, as aſſignees of the eſtate of *J. Dowding*, a bankrupt, for a ſum of money, for goods ſold and delivered to the defendant. Upon the general iſſue pleaded, a verdict was found for the plaintiffs damages 194 *l.* ſubject to the opinion of the court, upon the following caſe.

*J. Dowding*, the bankrupt, was a clothier, and employed *Edward Jeffries* a factor, who ſold to the defendant *Goodwin*, the cloths in queſtion, marked *J. Dowding*, *before* any act of bankruptcy committed by *J. Dowding*; but did not receive the money for them till *after* the action was brought. The cloths were ſold by *Jeffries*, as *factor*, and the defendant *Goodwin knew him to be ſo*, in the uſual courſe of buſineſs, and in his own name. The money was paid by *Goodwin* to *Jeffries*, after notice to him from the aſſignees not to pay it to *Jeffries*.

*Edward Jeffries* was a creditor of *Dowding*, for ſeveral ſums of money excluſive of the bonds hereafter mentioned; for which ſums he received full ſatisfaction by the money in his hands, or by cloths in his poſſeſſion. As to the bonds, *Dowding* borrowed money to the amount of 3,000 *l.* and upwards, and by letter bearing date the 1ſt of *May*, 1769, applied to *Jeffries*, his factor, to be ſecurity for him jointly in theſe bonds. The letter was as follows:

"Sir, I take the liberty of aſking you, whether, if I ſhould "meet with any ſum which the lender may think too large

"for

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" for my ſecurity only, you will favour me with your's jointly " with my own, upon my engaging, as a means to prevent a " poſſibility of danger to you, to ſend you all the cloths that " I ſhall make of ſuch monies, as you may be ſecurity for with " me."

To which *Jeffries* ſent the following anſwer;

" Sir, I am willing to join my name to yours, in the ſecurity " you propoſe on the plan I now lay down; which is done to " render a counter-bond unneceſſary, and to put me in the ſame " ſtate as if I advanced the money myſelf: this, I am ſatisfied, " you will not impute to my want of confidence in you, which " I have as fully as in any man; but it is pointed out to me by " the common rules of trade, and anſwers every purpoſe as fully " as can be: the plan I mean is, that the money ſhall be paid " into my hands, which you will draw for, as in common " courſe, and I will give you a memorandum of having received " ſuch ſum, to be employed ſolely to your trade, without any " claim for intereſt, provided you duly pay it to the obligor."

—When money was taken up on the joint bonds of *Dowding* and *Jeffries*, *Jeffries* acknowledged the receipt of it to *Dowding* in the following form: " I have this day received of *A. B.* " for your uſe 500*l.* for which I have given your account " credit." Accordingly the money due upon theſe bonds was ſtated in the annual accounts ſent by *Jeffries* to *Dowding*. No part of the money due upon any of theſe bonds was paid before the act of bankruptcy; but the whole has ſince been paid by *Jeffries*, and *Jeffries* has not ſufficient from the cloths in his hands, or the money due from the defendant, to ſatisfy the bonds.

The queſtion was, Whether the aſſignees were entitled to recover againſt the defendant?

Mr. *Buller* for the plaintiffs.—It will be inſiſted on the other ſide that the money being raiſed jointly by the bankrupt and *Jeffries*, muſt be conſidered as money really lent by *Jeffries* to the bankrupt; but though the letters affect to import as much, it is not true in point of fact, and, therefore, the tranſaction was a fraud upon the reſt of the creditors, calculated on the one hand to give the bankrupt a falſe credit, and on the other to give *Jeffries* the factor, a preference. But there was no immediate debt due from the bankrupt to the factor, at the time of the agreement. For the bankrupt was liable in the firſt inſtance, and if the bankrupt had paid the money, the factor could never

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never have called upon the bankrupt. 2. There was no debt due to the factor at the time of the action brought; for at that time he had paid no part of the money taken up on the bonds, nor was he ever any money in advance to the bankrupt. On the contrary it is expreſsly ſtated in the caſe, that all the money paid by the factor was paid ſince the action brought; ſo that at the commencement of the ſuit, the factor was no creditor at all. If ſo, this is no more than the general caſe, where a ſale by a factor is conſidered as a ſale by the owner himſelf, for which the owner may bring his action: for at the utmoſt there was but a poſſibility of a debt due to the factor at the time.

But ſecondly, it is inſiſted on the part of the defendant, that the factor has now a lien on the price. Let us examine therefore what a lien is? It is a tye or hold upon goods or other things, which a man has in his *cuſtody*, and which he has a right to retain till he is paid what is due to him; but that can only be where he *has* the *cuſtody* and poſſeſſion of the thing. He cannot have a right to hold that which he has *not* in his *cuſtody*; for without the cuſtody there is no lien, and ſo it is expreſsly laid down in *Chapman* verſus *Derby*, 2 *Vern.* 117. 1 *Atk.* 134. and the caſes there cited. But here the factor has parted with the poſſeſſion, by diſpoſing of the goods to the defendant; therefore he had no lien on them; and as to the price or value of them, that clearly was not in his hands or poſſeſſion, at the time of the action brought; therefore, there could be no lien on that: and conſequently the payment afterwards was fraudulent.

Mr. *Davenport*, *contrà*, for the defendant.—It is too clear to be diſputed, that every factor has a lien for the general balance of his accounts; and, therefore, *Jeffries* certainly had a lien for ſuch general balance. In this caſe the points are two. 1ſt. Whether poſſeſſion muſt unite with the lien; and if it muſt, whether that poſſeſſion has been parted with in this caſe? 2d, Whether this tranſaction is in its nature fraudulent. 1ſt, The lien in this caſe has not been parted with. I admit the right of the principal to maintain an action for goods ſold by his factor, but then it muſt be qualified with this reſtriction; namely that the principal is not indebted to his factor; if he is, he cannot: becauſe, if he could, the factor would have no ſecurity in his hands. Now that ſecurity is not confined to the actual poſſeſſion of the goods themſelves; for in that ſituation they are mere lumber: it is the value of them which is the real ſecurity, and that value, when the goods are parted with, the factor has a right

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to retain, and is in law a continuation of the poſſeſſion. In this caſe no account was kept between *Goodwin* and the bankrupt; the only account was between *Goodwin* and *Jeffries*. The bankrupt could not have brought an action againſt *Goodwin*, without the intervention of *Jeffries*. If ſo, the aſſignees can be in no better ſituation than the bankrupt himſelf would have been in. *Jeffries* is in the ſame ſituation as the acceptor of a bill of exchange, who has a right to ſell the goods of the drawer, and to reimburſe himſelf with the value. But if ſelling the goods were ſuch a parting with the poſſeſſion as would deveſt the lien which he had before, the miſchief and inconvenience to trade would be endleſs. So here *Jeffries*, having advanced this money upon his own credit, when the goods came to his poſſeſſion, had a right to ſell them, and to retain the value to reimburſe himſelf. The poſſeſſion, therefore, remained as much as if the goods themſelves had remained.

2dly, This mode of dealing was no fraud upon any of the creditors, or upon the aſſignees. For *Dowding* could not have carried on his trade without money or credit. *Jeffries* not having money, lends him his credit and name, by becoming ſurety in theſe bonds; that is to all intents and purpoſes, the ſame thing as if he had lent him money; and it was not competent to *Dowding* to ſue *Jeffries* for any money he might receive, till *Jeffries* had diſcharged the amount of the bonds; for till then the balance was againſt *Jeffries*: therefore, the law and juſtice of the caſe is, that the fair balance ſhould now be ſettled between him and the creditors of the bankrupt. And ſo it was held, 2 *Chan.* Caſes, 36. Suppoſe a factor were to fail, and his aſſignees afterwards receive money for goods ſold by him as factor; it has been determined in that caſe, that the principal is not to come in as a creditor under the commiſſion, for the general balance, but ſhall receive the full value of the goods. For the ſame reaſon, the factor in this caſe is entitled to all the goods in his poſſeſſion.

Lord MANSFIELD.—I think you ſtate the material fact of the caſe contrary to the finding. The queſtion you make is, Whether the poſſeſſion continues? And to judge of that, the tranſaction ſhould be known. Now the tranſaction was thus: *Jeffries* ſold theſe goods to the defendant *Goodwin*, in his own name; without any reference to the principal, or without even making the principal creditor for them. But the goods are marked *J. Dowding*: therefore, the defendant muſt have known he was the

principal, and that was the reaſon of making that fact part of the caſe. 1775.

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I ſhould be glad to know if there is any authority, where, after a factor had ſold goods in the manner here mentioned, it has happened that the principal has forbid the vendee to pay the value to the factor, and the vendee has notwithſtanding paid the factor. In this caſe the whole turns upon the circumſtance of the aſſignees (who ſtand in the place of the bankrupt) having forbid the defendant to pay *Jeffries*: there can be no doubt, that where a factor, who is fully paid all his demands, becomes bankrupt, the property of all the goods remaining in his hands is in the principal, and he may ſue for them in his own name.

*Cur. adviſare vult.*

Afterwards, on *Tueſday* 16th of *May*, Lord *Manſfield*, after ſtating the caſe, delivered the opinion of the court, as follows:

It appears from the facts ſtated in this caſe, that the defendant *Goodwin* has taken upon himſelf to pay the money in queſtion to *Jeffries*, after notice from the aſſignees not to pay it to him, and after, which I take for granted, an indemnity offered by them, and alſo an indemnity from *Jeffries*. It is, therefore, the caſe of *Jeffries*; and the queſtion is between *Jeffries* and the aſſignees, which is entitled to receive this money.

The maxim of law which ſays, that it ſhall not be in the power of any man, by his election, to vary the rights of two other contending parties, is a very wiſe maxim, as well as a very fortunate one, for the parties who are ſo diſputing; becauſe, by giving notice to ſuch perſon to hold his hand, and offering him an indemnity, he renders himſelf liable to the true owner, if after ſuch notice he takes upon himſelf to decide the right. And, therefore, though the purchaſor of goods from a factor has a right to pay him the money, and be diſcharged; yet when the principal and factor has a diſpute, the buyer, with notice of ſuch diſpute, has no right to prejudice the title of the principal. This caſe, therefore, is in the nature of a bill of inter-pleader. The defendant is the ſtake holder, the aſſignees and *Jeffries* are contending, and the court is to decide.

*Jeffries* claims the money, as having a lien on it, and the aſſignees claim it as ſtanding in the place of the bankrupt.

*Jeffries* claims it as having a lien. To conſider the caſe therefore firſt upon the *general queſtion*, we think that a factor who receives cloths, and is authoriſed to ſell them in his own name, but

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but makes the buyer debtor to himself; though he is not answerable for the debts, yet he has a right to receive the money: his receipt is a discharge to the buyer; and he has a right to bring an action against him, to compel the payment; and it would be no defence for the buyer in that action to say, that as between him and the principal he (the buyer) ought to have that money, because the principal is indebted to him in more than that sum; for the principal himself can never say that, but where the factor has nothing due to him. There is no case in law or equity, where a factor having money due to him to the amount of the debt in dispute, was ever prevented from taking money for cloths in his hands.

That being the general rule, let us see whether this case differs at all from it. It certainly does not. On the contrary, it is greatly strengthened in the present case, for there is not the least colour to suggest a fraud. But the principal and factor enter into a special agreement, by which the factor undertakes and actually pledges his credit to raise money, for the benefit of the principal; which money is to be worked up in cloths, and which cloths when so worked up, the principal agrees to send to the factor. The agreement therefore is, that he shall have a lien. For he says, "be security for the money, and I will send "you all the cloths."—What is the form in which the transaction is put? The factor knew very well that for a general balance of his accounts he had a lien, but he doubted whether such lien would extend to a case in which he was only surety for his principal, and, therefore, he says, "I am led by the course "of the trade, to let the money be a joint-bond, *&c.*"

Therefore, we are all most clearly of opinion, that a factor has a lien on the price of goods in the hands of the buyer: and in this case, though he had not the actual possession of them, yet as he had a power of giving a discharge, or bringing an action, he had a right to retain the money, in consequence of his lien, as much as a mortgagee has by the title deeds of an estate in his hands, though he is not in possession. Therefore, let there be,

Judgment for the defendant.

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## DENN ex dim. BALDERSTON *verſus* BALDERSTON. *Same day.*

IN ejectment it appeared at the trial, that *George Balderſton* being ſeiſed of the premiſes in queſtion, duly made his laſt will, bearing date the 15th of *April*, 1761, and thereby amongſt other things deviſed as follows: Alſo, I give to my ſon *Thomas Balderſton*, two hundred pounds, to be paid to him by my executrix, herein after named. Alſo I give to my wife *Elizabeth Balderſton*, and her heirs for ever, all my houſes at the eaſt end of *Newborough-Street*, in *Scarborough*. I alſo give to her, and her heirs for ever, my two tenements in *Longweſtgate* and *Cooke-Row*, in *Scarborough*, aforeſaid. Alſo I give to my three ſons, *George*, *William*, and *Gillis*, and to their heirs for ever, my houſe, at the end of the *apple-market*, in *Scarborough*, aforeſaid, and my cloſe, in *Falſgrave*, as tenants in common, and not as joint-tenants, when they come at age of 21 years, and the rents and profits of them to be received by my executrix, till that time, and employed for their maintenance, education, and benefit, during their minority, and as any of them come at age, their ſhare of the rents and profits thereof to be received by them. Alſo I give to my wife, my houſe at the upper end of *Newborough ſtreet*, in *Scarborough* aforeſaid, now in my occupation, with all the furniture thereto belonging, during her natural life, a proper part of the accruing profits or rents thereof to be applied for the maintenance and education of my three daughters, *Iſabella*, *Elizabeth*, and *Janet*, to whom, and their heirs for ever, I give the ſame, after the deceaſe of my ſaid wife, as tenants in common, and not as joint-tenants. My will further is, and I do hereby order and direct, that *if* ANY *of my above-named children ſhall happen to die before they come of age of twenty-one years, and without lawful iſſue, then their property and ſhare in* ANY *of the above bequeathed premiſes ſhall be equally divided among the* REST *of my ſurviving children, ſhare and ſhare alike.*

Two of the younger ſons died under the age of *twenty-one* years, without iſſue. *William*, the ſurviving younger ſon, brought this ejectment for their ſhares. *Thomas* was of the age of 21 years, at the time of making the will. A verdict was "*children, ſhare and ſhare alike.*" The *eldeſt* ſon was *of age* at the date of the will. *Two* of the *younger* ſons died *under age*, and without iſſue. *Per curr.* The eldeſt ſon and the three daughters are equally entitled with the ſurviving younger ſon to the ſhares of the two deceaſed brothers.

Deviſe to the teſtator's *eldeſt ſon* of 200 *l.* alſo, to his *three* younger ſons G. W. and G. and their heirs, a houſe and cloſe, as tenants in common, *when they come at age of twenty-one years.* Alſo, to his wife, a houſe, and after her deceaſe the ſame to go to his *three daughters*, and their heirs for ever. And his will further was, "that "*if* ANY *of* "*his above* "*named* "*children* "ſhould "happen "to die "BEFORE "THEY "CAME OF "AGE, *and* "*without* "*iſſue*, then "*their* pro-"perty and "*ſhare in* "ANY *of* "*the above* "*bequeath-*"*ed premiſes* "*to be e-*"*qually* "*divided* "*amongſt* "*the* REST "*of his ſur-*"*viving*

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given for the plaintiff, subject to the opinion of the court, on the following question, *viz.*

Whether *William* the surviving younger son is entitled to the whole of the house at the east end of the *apple market*, in *Scarborough*, and the close in *Folfgrave*; or the said *Thomas*, and the daughters, or any of them, are entitled to any shares and parts thereof?

Mr. *Davenport*, for the lessor of the plaintiff. The question in this case is a question of intention, and I contend the testator never meant the different classes into which he had divided the objects of his bounty, should interfere with each other: but that their interests should be wholly distinct. The classes are four. 1st, His eldest son. 2d, His wife. 3d, His three younger sons. 4th, His three daughters. The clause in which he says, "if any, *&c.* of my above, *&c.*" must be confined to the daughters only; for the words "shall happen to die before the "age of 21 years," clearly shew that the testator could not mean to include *Thomas* his eldest son, because he was of age at the time; therefore the words cannot be construed in their literal sense. If so, the question is, whether the court does not see plainly, that the intention of the testator was to keep the classes mentioned, entirely separate; and that if one or more of the younger sons died, the surviving son or sons should take his or their part in exclusion of the daughters; and so if one or more of the daughters died, the surviving daughter or daughters should take her or their share, in exclusion of the younger sons. No other construction can satisfy the words, and therefore the lessor of the plaintiff is clearly entitled.

Mr. *Norton*, *contra*, insisted that the testator certainly meant all his children should be equally benefited by the death of any of them. If the construction contended for, on the part of the lessor of the plaintiff, were to take place, and two of the daughters had died, the surviving daughter would have had a better estate than the eldest son, which never could be the intention of the testator. He cited *Smith* versus *Doran*, in *Scacc.* where the testator devised one fourth part of his property to his eldest son, who was of age at the time; and the other three fourths to his three younger sons, who were all under age; and then added, "but if any of my said children should die before "21, then their respective property shall be divided amongst "all my children share and share alike." One of the younger children died, and the court held the elder was equally entitled with his younger brothers. And upon the authority of this

caſe, which he ſaid was in point, inſiſted that, *Thomas* the eldeſt ſon, and the three daughters, were equally entitled with the ſurviving younger ſons.

Lord MANSFIELD. There can be but one of two conſtructions of this will; either that the clauſe in queſtion relates to the diſtinct premiſes deviſed to the three ſons and the three daughters reſpectively, and ſo to make the ſubſtitution a limitation over, as between the three daughters, of their eſtate and as between the three ſons, of their eſtate; and the other is to blend them together.

ASTON Juſtice. In the preſent caſe I incline to think the teſtator did not mean to include his eldeſt ſon, becauſe the words are "if any of my children ſhall happen to die before the age "of 21," and the eldeſt ſon was of age at the time. As to the other children, if the word "reſpectively" had been put in, it would have been deciſive of his intention to keep the intereſt of the ſons diſtinct, as between them; and in like manner, the intereſt of the daughters diſtinct, as between them. I rather think it was meant to go to them reſpectively.

WILLES Juſtice. I think the teſtator meant to provide for his children as equally as he could, and, therefore, that his eldeſt ſon ſhould come in for his ſhare in the event which has happened. His eldeſt ſon was of age. His intention ſeems to have been, that if the younger children came of age they ſhould have an abſolute intereſt. But if they or any of them died under age, or without iſſue, then that their ſhare ſhould be equally divided amongſt the reſt of his ſurviving children. There is no reaſon why he ſhould be ſuppoſed to exclude his eldeſt ſon, and, as at preſent adviſed, I have no doubt he meant to include him in the event which has happened.

ASHHURST Juſtice, inclined to think the teſtator did not mean to exclude his eldeſt ſon; but gave no opinion.

*Cur. adviſare vult.*

Afterwards, on *Tueſday* the 16th of *May*, Lord *Mansfield*, after ſtating the caſe, delivered the opinion of the court as follows;

The queſtion turns upon the conſtruction of the clauſe by which the premiſes are deviſed over upon the contingency of *any* of the children dying *before* the age of 21 years, and without lawful iſſue.

One conſtruction contended for at the bar was, that it ſhould be taken *reſpectively*: that is, as a ſubſtitution of the eſtate deviſed to the three ſons, as between them; and again as a ſub-

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ſtitution of the eſtate deviſed to the three daughters, as between them; but that conſtruction cannot be maintained from the words; becauſe the teſtator expreſsly joins both the deviſes together: for he ſays, "their ſhare in *any* of the above bequeathed premiſes," ſo that he manifeſtly blends them together.

The next doubt upon the conſtruction of this will was, Whether *Thomas* the eldeſt ſon was to be included or excluded. Upon the *contingency* that is put in the clauſe in queſtion, namely, "if any of my above-named children ſhall happen to "die *before* 21," *Thomas* muſt be excluded; becauſe he was of age at the time of making the will, therefore, he could not be meant by that part of the clauſe.

The next doubt upon the conſtruction was, Whether "the reſt "of my ſurviving children" ſhould mean thoſe only who might die before 21, or whether it ſhould mean *all* the teſtator's ſurviving children. There were circumſtances thrown out at the bar, from whence it was inferred, that the teſtator was providing equally for all his children; but that does not appear upon the caſe; if it did, it would ſtrengthen the conſtruction which the court inclines to. But the court cannot ground their judgment upon matters not ſtated in the caſe. Upon what is ſtated, after ſome doubt, we are at laſt unanimouſly of opinion, that theſe words, "the *reſt* of my ſurviving children," take in *all* the ſurviving children; and conſequently include the eldeſt ſon. Therefore *William* the plaintiff, can only recover his ſhare of the premiſes in queſtion, equally with the other four ſurviving children, that is, a fifth part only.

Judgment for the plaintiff for a fifth party only.

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*Thurſday, May* 16th.

Common law power to *appoint* by *deed* executed in the preſence of two witneſſes, *ill* executed by a *will* — Otherwiſe, if the power had been to appoint by *any writing* or *inſtrument*, or other *general term*.

## The Earl of DARLINGTON *verſus* PULTENEY.

THIS was a caſe out of chancery, for the opinion of this court; and the material facts ſtated were as follow:

Sir *William Pulteney*, by his laſt will, bearing date the 30th of *April*, 1685, deviſed certain houſes and tenements, in the county of *Middleſex*, to his wife, for life. Remainder to his ſon *William Pulteney*, for life. Remainder to his grandſon *William Pulteney*, ſon of his ſaid ſon *William*, afterwards Earl of *Bath*, for life. Remainder to truſtees, to ſupport contingent remainders. Remainder to the firſt and other ſons of his ſaid grandſon *William* ſucceſſively in tail male. Remainder to the

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ſecond and other ſons of the ſaid teſtator's ſaid ſon *William*, ſucceſſively in tail-male. Remainder to the ſaid teſtator's ſon *John*, for life. Remainder to the ſaid teſtator's grandſon *Daniel*, for life. Remainder to truſtees, to ſupport contingent remainders. Remainder to the firſt and other ſons of the ſaid *Daniel*, ſucceſſively in tail-male; with remainder to the ſaid teſtator's grandſon *Henry*, for life; with remainder to truſtees, during his life, to ſupport contingent remainders: with ſeveral remainders over. Remainder to the ſaid teſtator, and the heirs of his body. Remainder to the teſtator's ſaid ſons *William*, *John*, *Charles*, and *Thomas*, ſucceſſively in tail general. Remainder to *Henry Guy*, Eſq; and his heirs for ever.

Afterwards, the ſaid *William* the grandſon, then Earl of *Bath*, being then tenant for life in poſſeſſion, of the ſaid houſes and tenements under his ſaid grandfather's will, and being alſo entitled under the will of the ſaid *Henry Guy*, to the ultimate remainder in fee, expectant on the ſaid ſeveral particular eſtates limited by the will of his ſaid grandfather: And *William Pulteney*, Eſq; commonly called Lord *Pulteney*, the only ſon of the ſaid Earl of *Bath*, being then of age, and being under the ſaid will of Sir *William Pulteney*, tenant in tail in remainder, of the ſame houſes and tenements, immediately expectant on the deceaſe of his ſaid father; the ſaid Earl of *Bath*, and Lord *Pulteney*, by indenture of bargain and ſale bearing date the 2d *January*, 1753, conveyed the ſame to *Thomas Newton*, to make him tenant to the *præcipe* for the purpoſe of ſuffering two recoveries of the ſaid premiſes, the uſes of which it was declared ſhould be, after limiting the ſame to the Earl of *Bath*, for life, and ſubject to a jointure of 1,500 *l.* a-year to lady *Bath*, "To "the uſe of ſuch perſon or perſons, and for ſuch eſtate or eſtates, "and in ſuch manner and upon ſuch truſts, and ſubject to ſuch "proviſoes, powers, and agreements, and for ſuch intents and "purpoſes, as the ſaid *William* Earl of *Bath*, and *William* lord "viſcount *Pulteney*, by any their *deed* or *deeds*, (either with "or without power of revocation) to be by both of them ſealed "and delivered in the preſence of two or more credible witneſſes "ſhould from time to time jointly grant, direct, limit, or ap-"point. And in caſe of the death of either of them the ſaid "*William* Earl of *Bath*, and *William* lord viſcount *Pulteney*; then "as the *ſurvivor* of them, by any *deed* or *deeds*, to be executed "as aforeſaid, ſhould from time to time alone grant, direct,

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"limit, or appoint, and in default of such appointment, to "the uses they before stood limited to, by Sir *William Pulteney*'s "will."

In *Hilary* term, 1753, the two common recoveries were duly suffered.—On the 12th of *February*, 1763, Lord *Pulteney* died, without having executed or joined with his father in the execution of any deed of appointment of any of the said hereditaments, and without issue.—On the 21st of *May*, 1763, the earl of *Bath* made his will, and thereby gave all his real estate whatsoever and wheresoever, other than and except the piece or parcel of ground, messuage, or tenement, with the erections and buildings therein after mentioned to be in the possession of the earl of *Egremont*, to his brother General *Pulteney*, in fee; and limits the said piece or parcel of ground to his said brother, for life, in strict settlement. This piece of ground was part of the estate late of Sir *William Pulteney*, and passed under the limitations in his will, to the Earl of *Bath*, and is comprized in the indenture of the 2d of *January*, 1753, and the recovery suffered in *Middlesex*, in pursuance thereof.

The Earl of *Bath* died on the 7th of *July*, 1764, without leaving issue. *General Harry Pulteney*, who was second son of *William Pulteney*, the son of Sir *William Pulteney*, survived his brother the Earl of *Bath*, and upon his death became heir of the body of Sir *William Pulteney*, and upon the death of the Earl of *Bath* came into possession of the estates late of the said Sir *William Pulteney*. General *Pulteney* by his will, dated 4th *August* 1767, devised all his messuages, grounds, lands, tenements, hereditaments, and real estate, in the county of *Middlesex*, and also all and every his manors, messuages, lands, tenements and hereditaments, and real estate in the county of *Somerset*, or any county adjacent to the said county of *Somerset*, and in the counties of *Montgomery*, *Salop*, and *York*, to trustees therein named, for 500 years. Remainder to the use of *Frances Pulteney*, for life. Remainder to the first and other sons of the body of the said *Frances Pulteney*, successively in tail male, with the several remainders over, and died on the 26th of *October* 1767, without issue; and upon his decease, the defendant Mrs. *Frances Pulteney*, grand-daughter of *John*, the second son of Sir *William Pulteney*, became heir of the body of the said Sir *William Pulteney*, and as such, became entitled to an estate-tail in such of the said hereditaments as were devised by the will of Sir *William Pulteney*, by virtue of the limitations in that will to Sir *William Pulteney*, and the heirs of his body, if

that

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that limitation was then in force. All the preceding limitations under that will being ſpent and determined, upon the deceaſe of General *Pulteney*, without iſſue.

The queſtion ſtated for the opinion of the court was, Whether ſo much of the eſtate comprized in the indenture dated the 2d of *January*, 1753, as was taken by the will of Sir *William Pulteney*, deceaſed, paſſed by the will of *William* earl of *Bath*, deceaſed?

Mr. *Kenyon*, for the plaintiffs.—The queſtion is, Whether the *will* of the Earl of *Bath* is a good appointment, under the power contained in the indenture of 2d *January*, 1753; or in other words, Whether it is for this purpoſe a *deed*? I contend it is: And firſt, it is obſervable with reſpect to powers in general, that they were a ſpecies of tranſmutation of property unknown to the common law, prior to the ſtatute of uſes, 27 *Hen.* 8. *c.* 10. At common law the only ancient conveyance of corporeal freeholds, was by livery of ſeiſin: prior to the ſtatute, courts of equity alone entertained queſtions of this kind; and the mode of conſtruction which they exerciſed at that time, was the ſame as they now exerciſe in the caſe of truſts. When the ſtatute of uſes gave the courts of law a power to judge of uſes, it muſt be ſuppoſed the legiſlature intended they ſhould judge of them by the ſame rules; for the only reaſon of giving the cognizance to them, was for the ſake of brevity and diſpatch. However, in ſome of the early caſes, the courts of law conſtrued powers very rigidly.

Powers are of three kinds.—*Firſt*, Naked powers, unaccompanied with any intereſt. To this ſpecies of powers only, the common law authorities apply; and the conſtruction of them, like the conſtruction of conditions to which they were compared, has been very rigid. *Secondly*, Powers granted to the donee of a particular eſtate. Theſe powers having their foundation in the will of the donor, were formely conſtrued ſtrictly in favour of the remainder-man; but no further: and of late even that ſtrictneſs has been thought wrong; ſo that now they are taken more liberally. 1 *Peere Williams*, 244. *Beale* verſus *Beale*.—2 *Burr.* 1,136. *Thirdly*, Powers reſerved by the donor to himſelf. Theſe powers have always been taken largely; and of this claſs is the preſent power. For though before the recovery was ſuffered, the earl of *Bath* was not abſolute owner of the inheritance, yet after the recovery he became ſo, and Lord *Pulteney* was in the ſame ſituation. The queſtion then will be, Whether

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it was the intention of Lord *Bath* to diſpoſe of this property. That it was his intention is manifeſt by the deviſe of *Egremont* houſe. If ſo, the only remaining queſtion is, Whether the inſtrument he has made uſe of was proper for the purpoſe? Now though every will is certainly not a deed, yet if a will has all the eſſentials of a deed, as this will has, it ſhall be taken to be a deed. *Spelman* in his gloſſary, title *factum*, and title *teſtamentum*, defines them both by the common technical name of *charta*. But a ſtrong circumſtance to ſhew that the Earl of *Bath* meant this ſhould be taken as a deed is, that the will is ſealed, which is no part or ingredient of a will; but is of the very eſſence of a deed. Therefore, the ſubſtantial part of what the inſtrument giving the power enjoins has been complied with, which is all that is neceſſary. The circumſtances are but cautions to prevent impoſition: and ſo it is expreſsly laid down in *Aſhton* verſus *Smith*, 1 *Chan.* Caſes, 263, 4. Lord *Bath* verſus *Montague* 3 *Chan.* Caſes, 126. There the deed of revocation by the terms of the power was to be executed by ſix witneſſes, three of whom were to be peers, whereas it was executed by three witneſſes only. But Lord *Somers* ſaid, that had the duke in *Jamaica* had an expreſs *deliberate intention* to revoke, and, to teſtify it, had gone as far in purſuance of the circumſtance as his condition in thoſe parts would admit, that is, by having the competent number of witneſſes, though none of them were peers, equity might have cured the defect. In *Hob.* 277. it is held that the judges ſhould be *aſtuti* to aſſiſt the intention of parties, rather than work a wrong by enforcing rigid rules. The ſame doctrine is held in *Sneyd* verſus *Sneyd*, in *Canc.* 3d *February*, 1747. *Kibbet* verſus *Lee*, *Hob.* 312. *Tollett* verſus *Tollett*, 2 *P. Williams*, 489. and Lord *King*'s opinion, in 2 *P. Williams*, 506. Theſe authorities agree, that where the intention of the party to do the act is manifeſt, the power ſhall be conſtrued liberally, and the execution of it favourably in ſupport of ſuch intention. Here the intention is manifeſt by a ſolemn and deliberate act, which, though not a deed, has all the requiſites of a deed; and, therefore, in every material reſpect is ſubſtantially and eſſentially the ſame.

Mr. *Dunning* for the defendant. A deed and a will are totally different things. The eſſence of a deed is ſealing and *delivering*, *Co. Litt.* 35. *b.* As to the intention of the Earl of *Bath* that does not appear ſo clear, for the deviſe of *Egremont* houſe is not of itſelf a ſufficient proof that he meant to diſpoſe of this property. With reſpect to the power, it is not of the claſs under

der which it has been ranked; for it is not a power proceeding from any original title or ancient dominion in Lord *Bath*: for at the time of the recovery, Lord *Bath* was only tenant for life, with the reverſion in fee. The only object of the recovery was to let in Lady *Bath*'s jointure, and when that purpoſe was ſatiſfied, Lord *Bath* remained in all other reſpects tenant for life, in ſtrict ſettlement.—The power was a power given by his ſon Lord *Pulteney*, with a view of enabling them to make a family ſettlement by ſome joint act, during their lives, or to be exerciſed in caſe of the death of either of them, by the ſurvivor.

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The caſes cited are not applicable to the preſent queſtion. *Sneyd* verſus *Sneyd*, was a caſe where children were unprovided for: and *Tollett* verſus *Tollett*, 2 *P. Williams*, 489. was the caſe of a wife under the ſame circumſtances. But Lord *Darlington* is neither wife, child, or creditor. And he relied on the caſe of *Dormer* verſus *Parkhurſt*, 2 *P. Williams*, 506. as a caſe in point.

Lord MANSFIELD.—Under the will of Sir *William Pulteney*, the earl of *Bath*, before he made his will, ſubject to his own chance of having iſſue male, and to the chance of his brother and ſeveral other perſons having iſſue male, had, as heir of the body of the teſtator, an eſtate tail in the premiſes in queſtion; which, if not docked by a common recovery, would have come to General *Pulteney*, his brother. He could, therefore, by virtue of the will of Sir *William Pulteney*, deviſe nothing by his own will but his reverſion in fee, which after an eſtate-tail in an adverſe claimant, was of no great value. To enable him to deviſe, it was neceſſary that he ſhould reſort to a common recovery, which however could not be ſuffered, without the aſſiſtance of his ſon. His ſon joined in it; and by this recovery, and alſo by the deed to make a tenant to the præcipe, it is provided, "that ſubject to "the earl of *Bath*'s eſtate for life, and a jointure of 1,500*l.* a "year to Lady *Bath*, the eſtate ſhould be limited to ſuch perſon "or perſons, and upon ſuch truſts as the earl of *Bath* and Lord "*Pulteney* by any their *deed* or *deeds*, either with or without "power of revocation, to be executed under their hands and "ſeals, and ſigned in the preſence of two witneſſes, ſhould "from time to time grant, direct, limit, and appoint; and in "caſe of the death of either of them, then that the ſurvivor of "them, by any deed or deeds executed as aforeſaid, ſhould alone "grant, direct, limit, or appoint, and in default of ſuch direc-"tion, and in the mean time to all the uſes of Sir *William* "*Pulteney*'s will."—After this, the earl of *Bath* makes his will, and

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and by it he gives every thing to General *Pulteney*, *abſolutely*, except the ſpot of ground upon which the earl of *Egremont's* houſe was built, which he gives in *ſtrict ſettlement*. Now theſe premiſes are a part of the eſtate deviſed by the will of Sir *William Pulteney*, and one uſe made of it at the bar is, that Lord *Bath* meant to ſettle theſe premiſes in the particular manner ſtated: and, therefore, meaning ſo to do, as againſt General *Pulteney*, there is a ſtanding condition, namely, that if he will take any part he muſt not diſturb the other deviſees. But that is not the queſtion ſent to us; and as to the intention of Lord *Bath*, there is no ſtrong intention one way or the other. The queſtion before us is, Whether by the general words of the will, this power ſo created, is well executed?

Be the value of the eſtate what it may, it does not alter the difficulty of the queſtion: whether it be worth 10*l.* or 10,000*l.* it is the ſame thing; if the court has no doubt on a queſtion, it is due to the parties that we ſhould deliver our opinion, without allowing them to litigate the matter further, in a ſecond or third argument.

I have no particle of doubt on this queſtion. It is very difficult to maintain, on any principle of law, reaſon, or convenience, a diſtinction between *equitable* and *legal* executions of powers; which were originally, in their nature, equitable, but are by the ſtatute of uſes transferred to common law. Mr. *Kenyon* has ſaid very truly, that at common law powers were unknown. They were modifications of truſts, and directions to the truſtees, which bound his conſcience, and which he was compellable in a court of equity to execute. The ſtatute of uſes transferred entirely all that was equitable into a legal modification; and the courts of law were then bound to aſk what was the equity; becauſe the ſtatute ſaid, that the law ſhould follow the equity. It has likewiſe been very truly ſaid, that there were few caſes upon the execution of powers before the *ſtat.* 27 *H.* 8. *c.* 10. and none have come down to our time by way of precedents. Powers, therefore, being a new thing, and the courts of law having no equitable precedents in point to guide them, compared them at firſt to conditions which they are not at all like; and conſequently held that they ſhould be conſtrued ſtrictly. They looked upon them in the light of powers veſted in a third perſon over the eſtate of another man; whereas, in fact, they are only a different ſpecies of ownerſhip and enjoyment of property. But a long ſeries of precedents has now ſettled in the court of chancery,

cery, that in the conſtruction of powers, wherever the power is executed for a *meritorious* conſideration, namely, as a proviſion for a wife or child, or for the benefit of creditors or purchaſers, there the preciſe form preſcribed for its execution need not be ſtrictly purſued: and if it is now ſettled it is ſettled on principles that exiſted before. 1775. EARL of DARLINGTON *verſus* PULTENEY.

That being the caſe, courts of law ought to follow equity; becauſe there ſhould be a general rule of property: and if the courts of equity ſay, we will preſume that where the execution is for a meritorious conſideration, a ſtrict adherence to the preciſe form was not intended, and therefore it is not neceſſary; the moment the ſame rule is fixed and adopted at law, every man who creates, and every man who is to exerciſe a power, underſtands what he is to do. In the conſtruction of powers *originally* in their nature *legal*, courts of equity muſt follow the law; be the conſideration ever ſo meritorious: for inſtance, powers by a tenant in tail, to make leaſes under the ſtatute, if not executed in the requiſite form, no conſideration ever ſo meritorious will avail. So with reſpect to powers under the civil-liſt act, powers under particular family entails, as the caſe of the duke of *Bolton*, *&c.*; equity can no more relieve from defects in them, than it can from defects in a common recovery. The principle upon which the rule of conſtruction in theſe caſes is founded is, that there is nothing to affect the conſcience of the remainder man. Therefore it is difficult upon principles to maintain any diſtinction between equitable and legal execution of powers. In the caſe of the Earl of *Bath*, *abroad*, where it was required that the power ſhould be executed by ſix witneſſes, three of which were to be peers of the realm, there being no peers there, if he had got ſix other people to ſign and ſeal, and conform to the requiſites of the power, it might have been good on account of the impoſſibility of executing it in any other way; but there is no impoſſibility in the preſent caſe.

We come then to the conſtruction of the preſent power, and to ſay whether the will of Lord *Bath* is a good execution of it. As to that queſtion, in conſtruing powers, there have, as I ſaid before, been ſome pretty narrow caſes: but I think, as being a ſpecies of property, they ſhould be conſtrued liberally. *Kibbett* verſus *Lee*, in *Hob.* 312. is a very proper deciſion.—As to the caſe of *Dormer* verſus *Thurland*, 2 *P. Williams*, 506. it goes a great way. There, a power was given by will, or any writing in nature of a will, ſealed and atteſted by three or more witneſſes, to *Baron* and *Feme*, to charge the premiſes with 2,000*l.* upon the death of either firſt: the huſband died firſt, and by will under

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under his hand, atteſted by three witneſſes, but *not ſealed*, charged the premiſes with 2000*l.* It was there ſtrongly contended that the will was a ſufficient execution of the power, being made according to the ſtatute of frauds.

Lord *King* was of opinion, that it was a good execution of the power, becauſe by will; and I own I ſhould incline to that opinion. But it was determined by the judges of *R. B.* that it was not.

There are two caſes however, that were lately decided in the Houſe of Lords, which have been conſtrued more liberally. The firſt is a caſe of the Earl of *Roſſcommon* againſt *Fowkes*, on the 3d *April*, 1745, on an appeal from *Ireland*. *Fowkes* and his wife made a ſettlement of the wife's eſtate, with a power to the wife on contingencies which happened, in theſe words, "by any *writing* under her hand and ſeal atteſted by two credible witneſſes, notwithſtanding her coverture, and as if ſhe was ſole and unmarried; and by the ſame or any other *deed*, notwithſtanding her coverture, to grant, limit, and appoint, *&c.*" She, by *will* duly executed, without reference to her power, deviſed her lands within that power, and the queſtion was, "whether the power was well executed by the *will?*" The court of common pleas in *Ireland*, certified to the court of chancery that it was; and ſo the Houſe of Lords here adjudged it according to the opinion of the judges who attended. Now there were only two witneſſes; it was to be "by the ſame," or "any other *deed*." It was contended theſe words did not apply to a will; but they laid hold of the words "any *writing*."

There was another caſe from *Ireland* laſt year in the Houſe of Lords, which was determined according to the opinion of the judges who attended*. It was a power to let leaſes for any time not exceeding 31 years, *or* three lives to *commence in poſſeſſion*. The execution of the power was a grant of a leaſe for 31 years, or three lives, *whichever ſhould laſt longeſt*. This, it was contended, was in manifeſt oppoſition to the power: becauſe, inſtead of being a leaſe for one or other of the terms *expreſsly* as the power directed, it was a leaſe for one or other, as chance ſhould direct. But according to the opinion of the judges preſent, it was a good execution of the power for 31 years; and they rejected the words "three lives." The doctrine of theſe authorities applies only to caſes where there are words to lay hold of. But the difficulty in the preſent caſe is, that there are no words to lay hold of. The firſt requiſite which the power preſcribes is impoſſible to be performed by will; which is, that it ſhall be by *joint deed* of Lord *Bath* and his ſon. Now there cannot be a *joint will*. It is true the

* *Commons*, Leſſee of Lord *Netterville*, and Sir *Charles Burton* verſus *Maſkall*.

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ſurvivor has the ſame power. But then it is emphatically reſerved to be executed by "*deed*:" Now the word deed in the underſtanding of law has a technical ſignification, to which a will is in no reſpect applicable. If any words had been thrown in, ſuch as writing, inſtrument, or other term of a general comprehenſive meaning, it might have been fair to have taken advantage of it in favour of the intention. But here are no ſuch general words, nor any meritorious conſideration. If there were, it might have fallen within the reaſoning of *Tollett* verſus *Tollett*, 2 *P. Williams*, 489. and all the other caſes which ſay that in the execution of powers for a meritorious conſideration, it is not neceſſary ſtrictly to adhere to the preciſe form. But thoſe very caſes ſhew, that where there is no meritorious conſideration, the intention of the perſon who creates the power cannot properly be fulfilled, unleſs the form is ſtrictly purſued. Therefore in this caſe there does not ſeem to me a poſſibility of ſaying that a will is a deed within the terms of this power; and whatever the conſequence may be, as we are very clear in our opinion, the juſtice of the caſe requires that we ſhould deliver that opinion *now*, and certify accordingly.—The certificate was in theſe words:

"Having conſidered the above caſe, and heard counſel on both ſides, we are of *May* 17, 1775.
"opinion that the *power* given by the declaration of the uſes of the recovery above-
"mentioned was not duly executed by the will of the late Earl of Bath: and con-
"ſequently, that only the reverſion in fee of the premiſſes compriſed in the ſaid re-
"covery, paſſed by his ſaid will."

## PIERCE *verſus* BARTRUM.

*Same day.*

THIS cauſe came before the court upon a demurrer to a declaration in debt, brought by the plaintiff, as chamberlain of the city of *Exeter*, againſt the defendant, for ſlaughtering two oxen within the city of *Exeter*, contrary to a by-law made by the mayor and common council of *Exeter*, under a general power given them by charter, *anno* 3 *Eliz.* to make by-laws. The terms of the by-law were as follow:

That no butcher or other perſon ſhould within the walls of the ſaid city ſlaughter any beaſt, upon pain to forfeit for every bull, ox, cow, or heifer, ſo ſlaughtered as aforeſaid, the ſum of 40 *s.* and for every other beaſt ſo ſlaughtered as aforeſaid, the ſum of 20 *s.* And that no butcher or other perſon ſhould keep any ſwine within the walls of the ſaid city, nor any ſtinking filth, garbage, or annoyance, within his houſe, curtilage, or backſide, upon pain to pay for every time ſuch butcher or other perſon ſhould ſo offend, the ſum of 5 *l.*

The

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The declaration charged the defendant to have had notice of the ſaid by-law: but did not ſtate him to be free of the city of *Exeter*.

Mr. *T. Cowper*, in ſupport of the demurrer, objected that this by-law was void; 1ſt, as being *in reſtraint of trade*: and 2dly, becauſe it included perſons who were *not free* of the city, without any *cuſtom* ſhewn to warrant it. The prohibition is againſt ſlaughtering any ox, bull, or cow, within the walls of the city of *Exeter*. This is a common law right, and nothing but a cuſtom can controul it. If there were ſuch a cuſtom the defendant no doubt, if he choſe to reſide there, would be bound to take notice of it.

But without ſuch a cuſtom he is not, becauſe he has no means of knowing that ſuch a by-law exiſts.

Serjeant *Glynn*, *contra*, inſiſted that this by-law was not in reſtraint of trade; if it were, he agreed the objection would hold. But the prohibition in this caſe was a nuiſance at common law, and alſo by the *ſtat.* 4 *H.* 7. *c.* 3. and inſtanced ſimilar by-laws in *London*, againſt exerciſing the trade of a butcher in *Cheapſide*, and againſt brewers and tallow-chandlers in cloſe parts of the city. As to the ſuppoſed ignorance of the party, he ſaid it was an eſtabliſhed rule of law, that whoever comes to reſide in any place, is for the time being ſubject to the local juriſdiction of ſuch place: and, therefore, all the inhabitants within the limits of a corporation, are liable to the laws made by them for the good government of the community, even if not admitted to the freedom of it.

Lord *Mansfield*. This is a very clear caſe. The by-law in queſtion is not a *reſtraint* of trade, but only a regulation of it in this particular city: and it is made in confirmation of the act of parliament which has been mentioned. As to the objection that the defendant was a ſtranger, what my brother *Glynn* has ſaid is a complete anſwer to it; namely, that he is an inhabitant *pro hâc vice*, and conſequently is bound by the ſame regulations as the other members of the corporation are. Therefore I am of opinion the by-law is good, and that the demurrer muſt be overruled.

*Aſton* Juſtice. I am entirely of the ſame opinion. The defendant is ſubject to the local government of the corporation, though he is not a member of it. As to the by-law itſelf, it is certainly not a reſtraint of trade, but a regulation only; and I think

think a reaſonable one, and therefore it ſhall bind the inhabitants. 1775.

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*Willes* and *Aſhhurſt* Juſtices, were of the ſame opinion.

Demurrer overruled.

## DENN ex dim. WILLIAM BURTON and MICHAEL BURTON *verſus* CATHARINE BURTON.

*Friday, May 19th.*

IN ejectment a verdict was found for the plaintiff, ſubject to the opinion of the court upon a ſpecial caſe, the material facts of which were in ſubſtance as follow:

That the teſtator, *William Burton*, was ſeiſed in tail general of an eſtate called *Owlerton*, in the county of *York*, ſubject to an eſtate for life therein to one *Margaret Bamforth* widow, for her jointure, and ſubject alſo to an eſtate for life therein to his wife, for her jointure. He was alſo ſeiſed of an eſtate for life, in the manor of *Wadſley* in the ſaid county, with remainder to his children, on the body of his ſaid wife to be begotten, for ſuch eſtates and in ſuch proportions as he ſhould by deed or writing, or by his laſt will appoint. He was alſo ſeiſed of ſeveral other lands and premiſes. He had by his ſaid wife five ſons, *George*, *John*, *William*, *Michael*, and *Robert*, and two daughters. He was likewiſe poſſeſſed of a conſiderable real and perſonal eſtate: and being ſeiſed as aforeſaid, by his will bearing date 24th *June*, 1761, amongſt other things deviſed as follows:

"I give, deviſe, limit, direct and appoint unto my ſecond "ſon *John Burton*, his heirs and aſſigns for ever, all that the "manor of *Wadſley*, in the pariſh of *Eccleſfield*, in the county "of *York*, &c. Provided always and upon condition neverthe-"leſs, and it is my mind and will, that if it ſhall ſo happen that "my eldeſt ſon *George Bamforth Burton* ſhall die in the life-"time of my ſaid ſon *John Burton*, without leaving any iſſue "of his body then living, and by reaſon thereof the manor of "*Owlerton*, in the ſaid pariſh of *Sheffield*, and other the eſtate "now ſettled in jointure upon *Margaret Bamforth*, of *High-"houſe* aforeſaid, widow, of which my ſaid ſon *George Bamforth* "*Burton* will become ſeiſed in poſſeſſion at the death of the "ſaid *Margaret Bamforth*, in caſe he ſhall be then living, ſhall "*deſcend* and *come* to him my ſaid ſon *John Burton*, that then "and *in that caſe* I give, deviſe, limit and appoint the ſaid ma-"nor of *Wadſley*, with the rights, members, and appurtenances "thereof,

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"thereof, and the ſaid capital meſſuage or manor houſe, with "the out-houſes, lands, tenements, and hereditaments, here- "in before given, deviſed, limited, and appointed unto my ſaid "ſon *John Burton*, and his heirs, unto and *to the uſe* and "behoof of my ſons *William Burton* and *Michael Burton*, their "heirs and aſſigns for ever, equally to be divided between "them ſhare and ſhare alike, to take as tenants in common, and "not as joint-tenants; PROVIDED always and upon this further "condition nevertheleſs, and it is my mind and will, that if it "ſhall ſo happen that both of them my ſaid ſons *George* and "*John* ſhall die in the life-time of my ſaid ſon *William*, with- "out leaving any iſſue of their or either of their body or bodies "then living, and by reaſon thereof the ſaid manor of *Owler-* "*ton*, and the ſaid eſtate ſettled in jointure on the ſaid *Marga-* "*ret Bamforth* as aforeſaid, ſhall *deſcend* and *come* to him my "ſaid ſon *William Burton*, then and *in that caſe* I give, deviſe, "limit, and appoint the ſaid manor of *Wadſley*, with the ſaid "capital meſſuage, lands, tenements, and hereditaments, here- "in before limited and appointed unto my ſaid ſon *John*, unto "and *to the uſe* of my ſaid ſons *Michael Burton* and *Robert* "*Burton*, their heirs and aſſigns for ever, equally to be di- "vided between them ſhare and ſhare alike, to take as tenants "in common, and not as joint-tenants. PROVIDED further "and upon condition nevertheleſs, and it is my mind and will "that if it ſhall happen that they my ſaid ſons *George*, *John*, "and *William*, ſhall all of them happen to die in the life-time "of my ſaid ſon *Michael*, without leaving any iſſue of their or "any of their body or bodies then living, and by reaſon thereof "the ſaid manor of *Owlerton*, and other the ſaid eſtate ſettled "in jointure on the ſaid *Margaret Bamforth*, ſhall *deſcend* and "*come* to him my ſaid ſon *Michael*, then and *in that caſe*, I "give, deviſe, limit, and appoint the ſaid manor of *Wadſley*, "with the manor-houſe, *&c.* and all other the meſſuages, "lands, tenements, and hereditaments, herein before limited and "appointed to my ſaid ſon *John*, unto and to the only uſe and "behoof of my ſaid ſon *Robert Burton*, his heirs and aſſigns "for ever."

That *George Bamforth Burton* died without iſſue, in *July* 1762, in the life-time of the teſtator; who died on the 19th of *May* 1764, without altering or revoking his will; whereupon *John*, his ſecond ſon, entered into poſſeſſion of the manor and eſtate in *Wadſley*, and continued to receive the rents and profits

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thereof till his death on the 11th *November*, 1772: and by his will dated *July*, 1770, gave all his eſtate to the defendant *Catharine Burton* his wife, and left iſſue only one daughter. The queſtion for the opinion of the court was, whether *William Burton* and *Michael Burton*, the leſſors of the plaintiff, are entitled to the ſaid manor of *Wadſley*, and the capital meſſuage and eſtate called *Wadſley-Hall Farm*, or not?

Mr. *Davenport* for the plaintiffs, ſtated the queſtion to be, whether upon the death of *George*, *William* and *Michael Burton* were entitled to the manor of *Wadſley*, in the life time of *John*; and inſiſted they were.—The queſtion is a queſtion of intention; and upon the plain conſtruction of the will, it is clear that the teſtator meant to keep the eſtate of *Wadſley* and the eſtate of *Owlerton*, from uniting in any one ſon, except *Robert* the youngeſt. If ſo, it would be a forced conſtruction to ſay, the words "*deſcend and come*," mean an actual "*coming into poſ-*"*ſeſſion*:" becauſe in that caſe, if *George* had died on one day, and the jointreſs the next, the eſtates would have united in *John*; and then even if *John* had died without iſſue, the younger brothers never could have taken; becauſe his widow would have been entitled. Therefore, upon the plain conſtruction of the words, and the clear intention of the teſtator, the plaintiffs are each entitled to a moiety of the manor of *Wadſley*.

Mr. *Tooker*, *contra*. The queſtion is, Whether the family of *John* ſhall in any event loſe the manor of *Wadſley*, till they get the poſſeſſion of *Owlerton*: and he inſiſted they ſhould not. The intention of the teſtator was to give a permanent proviſion to *John*, and in the event of his elder brother *George* dying without iſſue, to make that proviſion better, by ſubſtituting the manor of *Owlerton* for that of *Wadſley*. If ſo, the conſtruction muſt be, that the eſtate at *Owlerton* muſt come into poſſeſſion before the deviſe over of *Wadſley* to the plaintiffs can take place, and conſequently till that event happens they are not entitled.

Lord MANSFIELD. Upon the words of the will there are two branches of contingency: 1ſt, "If it ſhould ſo happen that "*George* ſhould die without iſſue in the life-time of *John*;" and 2dly, "if by reaſon thereof the lands in jointure ſhould "deſcend and come to *John*." But what creates the puzzle and doubt is, that there are two ways in which the expreſſion "deſcend and come," may be conſtrued. 1ſt, It may mean a coming *into poſſeſſion* in oppoſition to the outſtanding jointure.

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If there were no other way of anſwering this proviſo, it would be very ſtrong in favour of the defendant. But it may likewiſe mean, if in fact it ſhall deſcend and come; which is the caſe that has happened. To be ſure, if at all events the eſtate in jointure muſt have come to *John*, there would have been no occaſion for inſerting this proviſo. But it was in the power of *George* to have barred all the remainders if he had lived, and to have prevented the eſtate from coming to *John* at all. On the other hand, the circumſtance of the teſtator *beginning* with the *ſecond* ſon in his deviſe of the *Wadſley* eſtate is material. We will think of it.

Afterwards, on the 28th of *May*, in this ſame term, Lord *Mansfield* after ſtating the caſe, delivered the opinion of the court as follows:

The queſtion is, Whether upon the death of *George*, in the life-time of the widow, *John* has loſt the poſſeſſion of the manor of *Wadſley*?

Firſt, to conſider it upon the words of the will, there is expreſsly a *double* contingency, upon which the eſtate of *Wadſley* is given over: For not only *George* was to die without iſſue, in the life-time of *John*; but the lands in jointure, namely, the eſtate of *Owlerton*, were to deſcend and come to him. Now there are two ways by which theſe lands might have been prevented from coming to *John*. 1ſt. *George*, if he had ſurvived the teſtator, might by a fine have barred the eſtate tail. And 2dly, with the conſent of the jointreſs he might have barred the whole by a common recovery. However in fact the eſtate at *Owlerton* did deſcend and come to *John*. But it did ſo, while the jointreſs was in poſſeſſion. Was he then to loſe *Wadſley* during her life, and ſo have nothing at all in the intermediate time? Moſt certainly that could not be the intention of the teſtator. His view was plainly this: that the eſtates of *Wadſley*, and *Owlerton* ſhould not go together; but that whenever the ſecond or any other ſon ſhould become the elder by the death of his brother, or brothers, and for want of iſſue on their part, the eſtate at *Owlerton* ſhould deſcend to ſuch ſecond or other ſon, then *Wadſley* was to be a proviſion for the next brother in ſucceſſion, according to the directions of his will. But he clearly never meant that ſuch elder ſon ſhould loſe *Wadſley*, till he came into poſſeſſion of *Owlerton*.

Therefore upon the words of the will, ſtrongly ſupported by the intention of the teſtator, we are all clearly of opinion, that the

the contingency upon which the eſtate of *Wadſley* was to paſs from *John* to the plaintiffs, muſt happen upon the eſtate at *Owlerton*, *coming and deſcending to John in poſſeſſion*.

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Judgment for the defendant.

## PEAKE *verſus* OLDHAM in Error.

*Same day.*

ERROR from the Common Pleas in an action of ſlander, in which the plaintiff, now the defendant in error, declared that upon a *colloquium* of and concerning the death of one *Daniel Dolly*, the ſaid *Thomas Peake* ſaid to the ſaid *James Oldham*, "*you are a bad man, and I am thoroughly convinced* "*that you are* GUILTY, (meaning guilty of the *murder* of the "ſaid *Dolly*,) *and rather than you ſhould want a* HANGMAN, *I* "*would be your* EXECUTIONER." And being apprized that the ſaid words were actionable, and interrogated how he would prove, *what he ſaid*, anſwered, that "he would prove it by "Mrs. *Harvey*." 2. *You are a bad man, and I am thoroughly convinced that you are* GUILTY *(innuendo ut antea) and rather than you ſhould want a* HANGMAN *I would be your* EXECUTIONER. Being interrogated how he could prove the ſaid *James Oldham guilty* of the *murder* of the ſaid *D. Dolly*, he replied, "I can prove it by Mrs. *Harvey*." 3. "*You are* GUILTY," *(innuendo ut antea)* "*and I will prove it*." 4. "*I am thoroughly* "*convinced that you are* GUILTY," (meaning guilty of the *death* of *Daniel Dolly*), *and rather than you ſhould go without a* "HANGMAN *I will* HANG *you*." 5. "*You are* GUILTY." *innuendo* (*guilty* of the *murder* of the ſaid *Dolly*). By reaſon whereof, and to clear his character, the ſaid *James Oldham* was obliged to procure, and did procure, an inqueſt in due form of law to be taken on the body of the ſaid *Daniel Dolly*.

*I am thoroughly convinced that you are guilty (innuendo of the death of* D. D.) *and rather than you ſhould go without a hangman, I will hang you*, actionable.

*You are guilty (innuendo* of the *murder* of D D.) held, after verdict, a ſufficient charge of *murder*, tho' the *colloquium* were only of the *death*.

Upon not guilty pleaded, the jury found a *general* verdict upon *all* the counts, with 500*l.* damages.

The defendant firſt moved for a new trial in *C. B.* which was refuſed; and afterwards in arreſt of judgment, which rule was likewiſe diſcharged by *Gould* and *Blackſtone* Juſtices. (*Abſentib. De Grey* Chief Juſtice, and *Nares* Juſtice.)

Mr. *Davenport* for the plaintiff in error, objected to the 4th and 5th counts of the declaration, as containing no ſufficient ground of action. 1ſt, Becauſe the words there laid are not ſcandalous in themſelves. 2dly, Not relatively ſo, by reference

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to any prefatory matter before ſtated: and conſequently not capable of being made ſo by any *innuendo*.

1ſt, The words, "*you are guilty*," have no determinate meaning at all, without ſpecifying ſome act or charge to which they are referable, and, therefore, moſt clearly not actionable in themſelves. 2d. The *colloquium* laid is only a *colloquium* of the *death* of *D. Dolly*, not of an untimely or violent death, or that he died by the hands of the defendant, and, therefore, cannot by an *innuendo* be extended to a charge of murder. In *Miller* verſus *Buckden*, 2 *Bulſtrode* 10, 11. ſaying of the plaintiff, "you was "the *cauſe* of the *death* of *Dowland*'s child, and I will ſwear it "on the book," were held not actionable, as being too general. So here, the charge is only general, *viz.* "*You are guilty*," without naming any crime or offence. If ſo, ſuch general charge cannot be extended by any *innuendo*. For an *innuendo* is only explanatory of ſome prefatory matter before expreſſed. 4 *Rep.* 20 *Yelv.* 21. *S. C. Jenk. Cent.* 302. *caſe* 72. 4 *Rep.* 17.

3dly, There is no ground of ſpecial damage; for it was not compulſory on the plaintiff to have an inquiſition; nor could any expence on his part attend it; for the coroner could take nothing. Therefore, the two latter counts being clearly bad, the judgment of the *C. B.* ought to be reverſed.

Mr. *Buller* for the defendant, was ſtopped by Lord *Mansfield*, as being unneceſſary to give himſelf any trouble.

Lord MANSFIELD. It is much to be lamented, that in any ſort of action, the mere inattention or ſlip of counſel who are not always ſufficiently attentive upon what count the verdict is taken, ſhould be fatal to the party; contrary to the truth and juſtice of the caſe, the opinion of the judge upon the merits who tried the cauſe, and the meaning of the jury who pronounced the verdict. However in civil caſes the rule moſt certainly is ſettled, that where a verdict is taken *generally* and any *one* count is *bad*, it vitiates the whole. It has always ſtruck me that the rule would have been much more proper to have ſaid, that if there is any one count to ſupport the verdict, it ſhall ſtand good, notwithſtanding all the reſt are bad. In criminal caſes the rule is ſo; and one cannot, therefore, but lament that the reverſe is adopted in civil caſes; becauſe it is as it were catching juſtice in a net of form. However this conſideration will make the court lean againſt ſetting aſide a verdict upon ſuch an objection without very good reaſon, that is, without ſome apparent manifeſt defect; more eſpecially in a caſe like the preſent, where the

the words have appeared to the jury to be ſo ſcandalous as to induce them to give a verdict with 500 *l.* damages, and where that verdict has received the ſanction of the court in which the action was brought, by their refuſing to grant a new trial upon an application to them for that purpoſe. 1775. PEARE verſus OLDHAM.

Let us conſider then, the grounds upon which the declaration in the preſent caſe is attempted to be impeached. Two of the counts are objected to, *viz.* the 4th and laſt. In the 4th it is ſaid thus, "I am thoroughly convinced that you are *guilty*;" *innuendo*, that you are guilty of the death of the ſaid *Daniel Dolly*, "and rather than you ſhould go without a hangman, I "will hang you." Upon this count it is argued, that there are many innocent ways, by which one man may occaſion the *death* of another; therefore, the words "*guilty* of the *death*," do not in themſelves *neceſſarily* import a charge of *murder*; and conſequently, as no particular act is charged which in itſelf amounts to an imputation of a crime, the words are defectively laid. What? when the defendant tells the plaintiff "he is *guilty* of "the *death* of a perſon," is not that a charge and imputation of a very foul and heinous kind? Saying that ſuch a one is the *cauſe* of another's *death*, as in the caſe in 2 *Bulſtr.* 10, 11. is very different; becauſe a phyſician may be the *cauſe* of a man's *death*, and very innocently ſo; but the word "*guilty*," implies a malicious intent, and can be applied only to ſomething which is univerſally allowed to be a crime. But the defendant does not reſt here: on the contrary, in order to explain his meaning he goes on and ſays, "and rather than you ſhould be without "a hangman, I will hang you." Theſe words plainly ſhew what ſpecies of death the defendant meant, and, therefore, in themſelves manifeſtly import a charge of murder.

The *innuendo* to the words of the next count is, that they mean "*guilty* of the *murder* of *Daniel Dolly*," and the jury by their verdict have found the fact; namely, that ſuch was the meaning of the defendant. But that is not all; for the jury find a ſpecial damage ſuſtained by the plaintiff in being obliged, in conſequence of the charge ſo made by the defendant, to have an inqueſt taken on the body of the deceaſed.

What? After a verdict, ſhall the court be gueſſing and inventing a mode, in which it might be barely poſſible for theſe words to have been ſpoken by the defendant, without meaning to charge the plaintiff with being guilty of murder? Certainly not. Where it is clear that words are *defectively* laid,

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a verdict will not cure them. But where, from their general import, they appear to have been ſpoken with a view to defame a party, the court ought not to be induſtrious in putting a conſtruction upon them, different from what they bear in the common acceptation and meaning of them.

I am furniſhed with a caſe founded in ſtrong ſenſe and reaſon in ſupport of this opinion; the name of it is *Ward* v. *Reynolds*, *Paſ.* 12. *Ann. B. R.* and it is as follows: The defendant ſaid to the plaintiff, "I know you very well; how did your huſband "die?" The plaintiff anſwered, "as you may, if it pleaſe "God." The defendant replied, "no; he died of a wound "you gave him." On not guilty, there was a verdict for the plaintiff; and on a motion in arreſt of judgment, the court held the words actionable; becauſe, *from the whole frame of them, they were ſpoken by way of imputation.* And Lord Chief Juſtice *Parker* ſaid, "It is very odd, that after a verdict a court of juſtice ſhould "be trying whether there may not be a poſſible caſe in which "words ſpoken, by way of ſcandal, might not be innocently ſaid. "Whereas, if that were in truth the caſe, the defendant might "have juſtified, or the verdict would have been otherwiſe." So here, if ſhewn to be innocently ſpoken, the jury might have found a verdict for the defendant; but they have put a contrary conſtruction upon the words as laid, and upon the laſt count have found that the defendant meant a charge of murder: Therefore I am of opinion that the judgment of *C. B.* muſt be affirmed.

*Aſton*, *Willes*, and *Aſhhurſt*, Juſtices, of the ſame opinion.

Judgment affirmed.

*Same day.*

## CHAPMAN ex dim. STAVERTON, *verſus* EMERY.

One, *after* marriage, makes a ſettlement of certain premiſes upon him *eſt* for life, remainder to his *wife* for life, remainder to their iſſue in tail; and *three* years afterwards *mortgages* the premiſes to *B.* who was told there was ſuch ſettlement. The ſettlement is a *voluntary* conveyance within the ſtatute 27 *El. c.* 4.

IN ejectment, a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following caſe:

By indentures of leaſe and releaſe the 3d and 4th of *October*, 1769, between *Richard Emery*, and the defendant *Mary* his wife on the one part, and *Deodatus Staverton* of the other part, the ſaid *Richard Emery* made a mortgage in fee of the premiſes in queſtion to the ſaid *Deodatus Staverton*, for ſecuring the payment of 750 *l.* by annual inſtalments, the laſt of which was to be made on the 4th of *October*, 1776, with a covenant to levy a fine to the

uſe

uſe of the ſaid *Deodatus Staverton*; but no fine was levied, nor were the ſaid indentures of leaſe and releaſe ever executed by the defendant *Mary*. That *Deodatus Staverton* died *January* 13th, 1771, leaving the leſſor of the plaintiff his heir at law 1775. CHAPMAN *verſus* EMERY.

That by indentures of leaſe and releaſe, 28th and 29th *March*, 1766, between the ſaid *Richard Emery* and *Mary* his wife of the one part, and *Thomas Plumber* and *Joſeph Turner* of the other part; the ſaid *Richard Emery* in *conſideration* of *ten ſhillings*, and for divers other good cauſes and conſiderations, conveyed the ſaid premiſes to the ſaid *Thomas Plummer* and *Joſeph Turner in truſt* for the ſaid *Richard Emery* for life, remainder to his wife for life, remainder to the iſſue of the ſaid *Richard Emery*, and *Mary* his wife in tail; and in default of iſſue, remainder to the right heirs of the ſaid *Richard Emery* in fee, which ſaid indentures were executed by all the parties thereto.

It was proved that the above 750*l.* was part of a ſum of 1,200*l.* agreed, by the ſaid *Richard Emery*, to be paid to the ſaid *Staverton* for the place of carver to the lord mayor of *London*; and that while the negotiation for the purchaſe of the ſaid place was carrying on, the ſaid *Deodatus Staverton*, and alſo the leſſor, were adviſed by *Thomas Gates*, that the ſaid *Deodatus Staverton* ought to be careful in what he was about; for that he the ſaid *Gates* believed that *Richard Emery* had made a ſettlement of the eſtate intended to be mortgaged, upon his wife and children; for that *Emery*'s wife had told him the eſtate was ſettled upon her and her children: that the ſaid *Richard Emery* denied having made ſuch ſettlement, but the negotiation for the purchaſe of the ſaid place was ſtopped twice or thrice on that account.

It was alſo proved, that the ſaid *Deodatus Staverton*, who was in a declining ſtate of health, had, during the negotiation for the purchaſe of the ſaid place, frequently declared that he would not ſell his ſaid place to any perſon except the ſaid *Richard Emery*: that as the ſaid *Deodatus Staverton* grew worſe and worſe in his health, he was glad to take the ſecurity as it was, and ſo the firſt mentioned indentures were executed.

The queſtion was, Whether, under the circumſtances of this caſe, the leſſor of the plaintiff is entitled to recover the premiſes in queſtion?

Mr. *Whitchurch* for the plaintiff ſtated the queſtion to be, Whether the leaſe and releaſe of the 28th and 29th of *March*, 1766, were not a voluntary conveyance, within the ſtatute 27 *El.*

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*c.* 4. and, therefore, void as againſt the mortgagee, under whom the leſſor of the plaintiff claimed? He inſiſted it was; that the ſtatute had always received a liberal conſtruction, and cited 3 *Rep.* 82, *Twine's* caſe. *Moore*, 615. *Cro. El.* 444. 2 *Veſ.* 1. 2*dly*. That the notice found made no difference. 5 *Rep.* 60. *b*. Caſes in *Canc. temp.* Lord *King*, 65.

Serjeant *Sayer* for the defendant *contra*, inſiſted, that the *Stat.* 27 *Eli. c.* 4. related only to purchaſers; and that a mortgagee was not a *purchaſer* within the ſtat. 27 *El. c.* 4. The purchaſers there ſpecified are purchaſers in *fee-ſimple*, *fee-tail*, *for life* or *years*, and muſt be either abſolute or conditional purchaſers. But a mortgagee can hold the eſtate only till the debt is paid: therefore not a purchaſer within the meaning of the ſtatute. But ſuppoſing he was, yet here, the wife did not join, nor was any fine levied. 2*dly*, The mortgagee in this caſe had full and ſufficient notice, and no pretence or circumſtance of fraud appears; on the contrary, the ſettlement was three years prior to the mortgage; therefore, could not have been made with a view to defeat it. He cited *Townſend* v. *Windham*, 2 *Vez.* 10. where Lord *Hardwicke* ſaid, "If there is a voluntary conveyance of a real eſtate or chattel intereſt, by one not indebted at the time; if ſuch voluntary conveyance be for a child, and no particular evidence or badge of fraud to deceive ſubſequent creditors, it will be good, though the party afterwards become indebted."

Lord MANSFIELD.—I rather doubt Lord *Hardwicke's* ſaying that, Where a woman about to marry a ſecond huſband, makes a ſettlement of her eſtate upon the children by her firſt huſband, ſuch ſettlement has been held good.

Serjeant *Sayer* then ſuggeſted, that in fact the defendant had in conſideration of this ſettlement given up her intereſt in 1,470*l.* *South-ſea* annuities for her life. But Mr. Juſtice *Willes* who tried the cauſe, ſaid, there was no evidence of it at the trial.

Lord MANSFIELD.—That would have been a very material part of the caſe; and if upon inquiry the fact ſhould turn out to be really ſo, you may move for a new trial. But upon the caſe, as ſtated at preſent, no ſuch fact appears; and there is no doubt but a mortgagee is a purchaſer.

**Vide* 5 *Rep.* 60 *S P.* adjudged. 1 *Eq. Caſ. Abr.* 334. *Tomkins* v. *Ennis.*

As to the point of notice, it is held that notice makes no difference, becauſe it is of a conveyance made void by the ſtatute*.

Suſpend the delivery of the *poſtea* for a few days, to ſee if you have any evidence that can couple the wife's giving up her annuity with the ſettlement made upon her and her children; ſo

as to ſhew it was not a mere voluntary ſettlement, but made upon a ſufficient conſideration. 1775. CHAPMAN verſus EMERY.

*N. B.* No ſuch evidence was ſupplied, nor any further application made to the court afterwards.

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## FELL *verſus* RILEY.

*Saturday, May* 20th.

IT was decided in this caſe, that the rule of *Eaſter* term, 15 *Car.* 2. which provides, "That no warrant of attorney "for confeſſing a judgment executed by any perſon in cuſtody, "ſhall be of any force, unleſs ſome attorney, for and on behalf "of ſuch perſon in cuſtody, and expreſsly named by him, be pre-"ſent, to inform him of the nature of ſuch warrant," &c. does not extend to caſes where the defendant is in cuſtody upon an *execution*; but only to caſes where he is in cuſtody upon *meſne proceſs*. The court ſaid, the reaſon of the diſtinction was this; that where a man is arreſted upon *meſne proceſs*, the debt is not liquidated; and, therefore, under dureſs he may be prevailed upon to confeſs more than is really due. But upon an execution the debt is liquidated, and, therefore, the only purpoſe of the defendant giving a warrant of attorney in ſuch caſe is to procure his liberty. If indeed it could be ſhewn that a party, even in execution, had been prevailed upon to acknowledge a judgment for more money than was really due, the court would give relief under the circumſtances. Becauſe caſes of fraud and impoſition are exceptions to all rules whatſoever. But in the preſent caſe, the court obſerved there were no ſuch circumſtances, and therefore diſcharged the rule for ſetting aſide the judgment entered up on the warrant of attorney.

Warrant of attorney to confeſs a judgment by one in *cuſtody* under an *execution* is good, though no attorney be preſent on his behalf at the time of it's being executed. *Vide* 2 *Str.* 1245.

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## BROWN *verſus* BERKELEY.

*Tueſday, May* 23d.

THE plaintiff declared in an action of covenant upon certain articles of agreement for the ſum of 20*l.* laid between the plaintiff and the defendant, that the defendant did not, within one month from the date of the agreement, find a man who ſhould carry on foot twenty-four ſtone weight ten miles within fifteen hours time. To this declaration the defendant demurred.

A *foot-race* is a game within the *ſtat.* 9. *Ann.* c. 14.

Mr.

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Mr. *Buller*, in ſupport of the demurrer, inſiſted that this was a wager within the *ſtat.* 9 *Ann. c.* 14. and therefore void. For though the *ſtat.* 9 *Ann.* does not enumerate the different ſpecies of gaming mentioned in the *ſtat.* 16 *Car.* 2. *c.* 7.; yet it plainly has reference to, and includes them all under the general words, "*other game or games.*" Therefore in *Goodburn* v. *Marley*, *Str.* 1,159. *horſe racing* was adjudged to be within the *ſtat.* 9 *Ann. c.* 14. though not particularly mentioned in it. If ſo, it muſt alſo extend to *foot races*, for both are expreſsly named in the *ſtat. Car.* 2.

The only remaining queſtion then is, Whether this being a race againſt *time*, and by *one* perſon alone, makes any difference? With reſpect to which he cited *Lynall* v. *Longbottom.* 2 *Wilſ.* 36. where it was admitted by counſel, that a *foot race* was within the *ſtat.* 9 *Ann. c.* 14. and adjudged by the court, that as one horſe ſtarting alone, was a horſe race, ſo one perſon running alone, was a foot race.

Mr. *Davenport*, *contra*, contended that, at common law, all games were lawful; and, therefore, if this contract was void, it muſt be made ſo by ſome particular ſtatute. It has never been decided that *all* wagers, upon every event or contingency whatever, are within the ſtatute of gaming. Wagers depending on play are not within the ſtatute, and cited 1 *Salk.* 344. *Pope* v. *St. Leger*, *Jones* v. *Randall*, *ſupra*, 37. Earl of *March* v. *Pigot*, 5 *Burr.* 2,802.

But it is ſaid, that a foot race is expreſsly prohibited by *ſtat.* 16 *Car.* 2. and that *ſtat.* 9 *Ann. c.* 14. clearly has reference to it; and, therefore, though a foot race is not particularly mentioned in this latter ſtatute, it is nevertheleſs included under the general words, "*other game or games.*" If ſo, there needed no act of parliament againſt gaming or wagering policies, where there is no intereſt, nor againſt many other games ſince prohibited. The ſtatute ought expreſsly to have prohibited this ſpecies of contract, and not having done ſo, it remains, as it would have been at common law, a valid and good contract.

The court took time to conſider. Afterwards, on *Monday May* 29th, Lord *Mansfield* delivered the opinion of the court as follows:

We took time to ſee if we could diſtinguiſh this caſe from *Lynall* v. *Longbottom*, 2 *Wilſ.* 36. cited in the argument. We think there is no difference between them; and, therefore, there muſt be judgment for the defendant.

Judgment for the defendant.

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## REX *verſus* Dutcheſs of KINGSTON.

*Some days.*

MR. *Wallace* had moved * on the part of the defendant, for a *certiorari* to be directed to the juſtices of *oyer* and *terminer*, at *Hicks's-hall*, to remove into this court an indictment found againſt her, at the ſeſſions there, for *bigamy*; and, upon the motion the court granted the writ.

But now Lord *Mansfield* took notice to Mr. *Wallace*, that the motion was irregular. For a defendant has no right to remove an indictment of felony from *Hicks's-hall*, without the conſent of the proſecutor; and in this caſe there was no conſent, therefore his lordſhip ſaid the writ iſſued *improvidè*, and muſt be ſuperſeded.

* *May* 18th. A *certiorari* does not lie to remove an indictment for *felony* from the general ſeſſions of oyer and terminer, at *Hicks's-hall*, without the conſent of the proſecutor.

Mr. *Wallace* ſaid, the only object of removing the indictment was for the purpoſe of her being bailed: but *per* Lord *Mansfield*, the purpoſe for which it was intended, makes no difference.—The next day Mr. *Wallace* moved for a *habeas corpus*, Mr. Juſtice *Aſton* having granted a warrant for her apprehenſion (as had been ſettled amongſt the parties, as the propereſt method to be taken) upon a certificate of the indictment being found.

The warrant and the return to it were read; and then Mr. *Wallace* moved to bail her. He mentioned the ſuit in the ſpiritual court, upon the proceedings there againſt Mr. *Hervey*, for jactitation of marriage, and alſo the proceedings in Chancery relating to her marriage; all theſe proceedings were put into court, and entered as read. He obſerved, that ſhe muſt, at all events, be tried by her peers, as Mr. *Hervey* was now become Earl of *Briſtol*.

Mr. *Bearcroft*, for the proſecutor, conſented to her being bailed, as there could be no doubt (he ſaid) of her appearance to anſwer the indictment.

Lord MANSFIELD.—Though we ſhould undoubtedly have bailed her, it is better to take it as upon the conſent of the proſecutor; and ſhe muſt be bound to appear in the Houſe of Lords when required, to anſwer to the indictment, as well as to appear in this court. But as there is nothing againſt her in this court, her appearance here may be diſpenſed with for the future upon motion without giving her the trouble of actually appearing here in court any more.

Bail

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legacy. He expreſsly ſays, "Teſtamentary cauſes did not originally belong to the ſpiritual courts, but to the temporal courts and common law; and were proved before lords of manors, as they ſtill are in ſome places. And there are many precedents in the books, eſpecially in the old books of entries, where actions on the caſe, and actions of debt, were brought for legacies in the hundred court." He is ſupported in this opinion by 9 *Co.* 37. *b.* 2 *Roll. Abr* 217. Year-book. *Hil.* 11. *H.* 7. 12. *B.* Indeed, in *Nicholſon* v. *Shearman*, the other judges agreed, that during the time of the troubles, the temporal courts alone had cognizance of legatary matters. It is clear, therefore, from all theſe authorities, that the common law courts *once* had juriſdiction. If ſo, ſuch juriſdiction could only be taken away by an act of parliament expreſsly for the purpoſe. For it is a general principle, that wherever an action could be maintained at common law, it ſtill remains, unleſs expreſsly taken away by ſtatute. But no ſuch ſtatute exiſts; and the weight of authorities is the other way. As to the caſe of *Nicholſon* v. *Shearman*, the ground of that determination was, not that an action at common law would not lie, but that there it was a *truſt*, and the breach of it a *tort*, which dies with the perſon. The authorities in favour of the action are, *Raſtall's Entries*, 301. *a.* and *b.* "Declaration in debt againſt executors "by a legatee of the third part of the teſtator's goods, where "the *quantum* had been aſcertained by the ordinary." *Style* 55. where it is expreſsly ſaid, "an action will lie for a legacy." 2 *Lev.* 3. *Davis* v. *Rayner*, which was *aſſumpſit* in conſideration of "*forbearance* of a legacy," and held good, though *no aſſets*. *A fortiori*, an action could have been maintained for the legacy itſelf; otherwiſe forbearance would have been no conſideration. *Sid.* 21. *Butler* v. *Butler*.

The next queſtion is, Whether the facts ſtated in this declaration, namely, that the defendant was executrix, and had *aſſets*, &c. are a ſufficient conſideration for a promiſe. As to that queſtion, it is a ſettled point, that wherever an expreſs promiſe is made upon good conſideration, an action lies: And the ſlighteſt ground is ſufficient to maintain a promiſe. 1 *Vent.* 40, 41. *Wells* v. *Wells*, 1 *Lev.* 273. *S. C. Stone* v. *Withipool. Latch.* 21. in which latter caſe it is laid down, "That it is an uſual "allegation for a rule, that any thing which is a ground for "equity is a ſufficient conſideration."

But

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But here an expreſs promiſe is made, and by the demurrer admitted. It is objected, however, that there is no averment that the funeral expences are paid. The anſwer is, it is averred that he *had aſſets to pay*, which is alone ſufficient, and ſo it was expreſsly held by Lord *King*, in the caſe of *Camden* v. *Turner*, Sittings after *Tr.* 5 *Geo.* 1. *C. B.* Select caſes of evidence by Sir *John Strange*.

Lord MANSFIELD.—The argument in ſupport of this demurrer, has proceeded upon ſuppoſing a *general* queſtion, which is not at all involved in this caſe; and agitating that general queſtion, as if this were a declaration upon the ground of the will only, and nothing elſe. If it were a general queſtion, I ſhould not immediately give my opinion. The objection, however, that is taken upon the ſuppoſition of its being ſo, is, that a legacy, ariſing out of a will of perſonal eſtate, being a teſtamentary matter, the cognizance of it belongs peculiarly and *excluſively* to the eccleſiaſtical court; and conſequently, that the courts of common law have no juriſdiction. If that propoſition were true, the objection would hold equally againſt the juriſdiction of the courts of equity. For it is plain, that where the cognizance of any matter is the peculiar province of a particular *forum*, all other courts are excluded. For inſtance, a court of equity can no more try the validity of a will of perſonal eſtate, or the validity of a marriage, than this court. The judge of the admiralty has cognizance of the queſtion of prize. A court of equity is as much excluded as a court of law; and many other inſtances might be put.

It is objected, that this court cannot compel a legatee to refund, if debts ſhould appear. In that caſe, he would be liable to refund, whether he gave ſecurity or not. For it would be the caſe of payment upon a miſtaken ground. But if juſtice required it, this court would make the plaintiff's giving an indemnity, a condition of his recovering. There are many caſes where this court has made parties give indemnity.

It is true, that the law concerning legacies was made in the eccleſiaſtical court. The authority of the Roman law was received. The opinions of doctors and foreign authors upon the civil law, were quoted and reſpected.

When the courts of equity held plea of legacies, as *incident* to *diſcovery* and *account*, they adopted the whole ſyſtem by which legacies were governed in the eccleſiaſtical court. In like manner the courts of law, in the exerciſe of a concurrent juriſdiction, would adopt the ſame rules.

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But a legatee who ſues at law, muſt clearly prove that the defendant has received aſſets, which cannot be done, except in a caſe ſo clear as not to admit of litigation. In this reſpect, the *diſcovery* and *account* given in a court of equity is ſo preferable a remedy, that it has drawn all ſuch ſuitors thither: and therefore, in fact, there is ſcarce an inſtance of a legatee attempting to ſue at law. In clear caſes the legacies are paid; in doubtful, the relief given by a court of equity, is eaſier and better. But upon *principles*, if the queſtion is *conſtitutionally appropriated* to the eccleſiaſtical juriſdiction, it muſt equally exclude the courts of equity as well as law. I have mentioned thus much by way of obſervation upon the objection that has been made, as ſuppoſing this a caſe within the general queſtion; which, however, as I ſaid before, it is not.

This is a caſe in which the declaration particularly ſtates, that aſſets have been received by the defendant, the executor, more than ſufficient to pay all the teſtator's debts and legacies. If ſo, it moſt undoubtedly muſt be taken upon the pleadings, that there was ſufficient to diſcharge the funeral expences, becauſe they are payable firſt; conſequently, if there was leſs than the amount of them, there could not be ſufficient to diſcharge the debts and legacies. The declaration then goes on to ſtate, that in *conſideration* of there being full *ſufficient aſſets* as aforeſaid, the defendant undertook and promiſed to pay the plaintiff his legacy. No doubt then, but at any time after an executor has *aſſented*, the property *veſts*; and if it be a pecuniary legacy, an action at law will lie for the recovery of it. Formerly, upon a bill being filed in *Chancery* againſt an executor, one part of the prayer of it was, that he ſhould *aſſent* to the bequeſt in his teſtator's will. If he had aſſets, he was bound to aſſent: And when he had aſſented, the legacy became a demand which in law and conſcience he was liable to pay. But in the preſent caſe there is not only an *aſſent* to the legacy, but an *actual promiſe* and undertaking to pay it: and that promiſe founded on a good conſideration in law; as appears from the caſes cited by Mr. *Buller*, particularly the caſe of *Camden* v. *Turner*,* where acknowledgment by an executor, "that he "had enough to pay," was held a ſufficient ground to ſupport an *aſſumpſit*. Here the defendant by his demurrer admits he had ſufficient to pay: therefore, this is not the caſe that Mr. *Le Blanc* has been arguing upon; but it is the caſe of a promiſe made upon a good and valuable conſideration, which in all caſes is a ſufficient ground to ſupport an action. It is ſo in caſes of obligations, which

* Sittings after *Trinity* term. 5 *Geo.* 1. *C. B. coram King. C. J.*

which would otherwiſe only bind a man's conſcience, and which, without ſuch promiſe, he could not be compelled to pay. For inſtance, where an infant contracts debts during his minority; if after he comes of age he conſents to pay them, an action lies: So a conveyance executed by an infant, which he was compellable to do by equity, is a good conveyance at law. *Co. Lit. Attornment.* 315. *a.* In this caſe the promiſe is grounded upon a reaſonable and conſcientious conſideration; namely, that the defendant had aſſets to diſcharge the legacy. If ſo, he was compellable in a court of equity, or in the eccleſiaſtical court, to pay it. I give my opinion upon this caſe as it ſtands; that is, that it is an expreſs promiſe made upon a good and ſufficient conſideration. *Vide* the next caſe. 1775. ATKINS *verſus* HILL.

The three other judges concurred.

*Per Cur.* Judgment for the plaintiff.

Mr. *Le Blanc* then moved for liberty to withdraw the demurrer, and plead the general iſſue, but the court refuſed it.

## HAWKES & UXOR *verſus* SAUNDERS *.

*Hilary* term, 22 Geo. 3.

*Monday, Jan. 14th, 1782.*

*Aſſumpſit* lies againſt an executrix for a *legacy*, upon a *promiſe* in conſideration of *aſſets*.

THIS action was brought againſt the defendant in her *own right*; and the declaration ſtated, that *George Saunders*, by his will bequeathed a legacy of 50 *l.* to the plaintiff; that he appointed the defendant his executrix; that ſhe proved the will; that *goods* and *chattels* came to her hands *more than ſufficient to pay all the teſtator's debts and legacies*, by reaſon whereof ſhe became *liable* to pay the legacy, and being ſo liable, *in conſideration thereof* ſhe promiſed to pay it.

Lord MANSFIELD. This caſe does not at all involve in it the queſtion, whether a legatee has a *general* right to ſue for a legacy in this court.

But, if the action be brought againſt her *perſonally* in her *own right*; the judgment can only be *de bonis propriis*.

Two objections have been made; *1ſt*, That there can be no judgment in this caſe *de bonis teſtatoris*; becauſe the action is not brought againſt the defendant as *executrix eo nomine*; but is a *perſonal* demand againſt her *generally* in her *own right*. As to that, we are of opinion the objection is good; for the demand is certainly a *perſonal* demand againſt the defendant, in conſequence of a promiſe made by her, ſhe being executrix.

It is admitted at the bar, that *after verdict*, it muſt be taken to have been a promiſe *in writing*, and that there were *aſſets*. If

* I have inſerted this caſe out of the order of time, for the purpoſe of bringing the general doctrine upon the ſame ſubject under one point of view.

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ſo, the whole caſe is reduced to this ſingle point: Whether the circumſtance of the defendant having aſſets ſufficient to pay all the debts and legacies, is, or is not a ſufficient conſideration for her to make a promiſe to pay the legacy in queſtion? As to that point, the rule laid down at the bar, as to what is or is not a good conſideration in law, goes upon a very narrow ground indeed; namely, that to make a conſideration to ſupport an *aſſumpſit*, there muſt be either an immediate benefit to the party promiſing, or a loſs to the perſon to whom the promiſe was made. I cannot agree to that being the only ground of conſideration ſufficient to raiſe an *aſſumpſit*.

Where a man is under a legal or equitable obligation to pay, the law implies a promiſe, though none was ever actually made. *A fortiori*, a legal or equitable *duty* is a ſufficient conſideration for an actual promiſe. Where a man is under a moral obligation, which no court of law or equity can inforce, and *promiſes*, the honeſty and rectitude of the thing is a conſideration. As if a man promiſe to pay a juſt debt, the recovery of which is barred by the ſtatute of limitations: Or if a man, after he comes of age, promiſes to pay a meritorious debt contracted during his minority, but not for neceſſaries; or if a bankrupt, in affluent circumſtances after his certificate, promiſes to pay the whole of his debts; or if a man promiſe to perform a ſecret truſt, or a truſt void for want of writing, by the ſtatute of frauds.

In ſuch and many other inſtances, though the promiſe gives a compulſory remedy, where there was none before either in law or equity; yet as the promiſe is only to do what an honeſt man ought to do, the ties of conſcience upon an upright mind are a ſufficient conſideration. But an executor who has received aſſets, is under every kind of obligation to pay a legacy. He receives the money by virtue of an office which he ſwears to execute duly. He receives the money as a truſt or depoſit, to the uſe of the legatee. He ought to aſſent if he has aſſets. He has no diſcretion or election. He retains what belongs to the legatee, and therefore, owes him to the amount.

An account of aſſets, or a judgment to pay out of aſſets, is only neceſſary when the ſufficiency of aſſets is uncertain. Where the ſufficiency of aſſets received is certain, the executor's duty to pay a legatee, follows by neceſſary conſequence.

The legacy, in ſuch a caſe, is a demand clearly due from the executor upon various grounds of natural and civil juſtice, and

may

may be recovered from him by proceſs of law. In ſuch a caſe a promiſe to pay ſtands upon the ſtrongeſt conſideration. 1775.

HAWKINS, executrix, SAUNDERS.

Let us ſee then what the facts are in the preſent caſe. The executrix knows the ſtate of her teſtator's affairs, and of his property. It might conſiſt of chattels which ſhe might not chuſe to diſpoſe of. It might conſiſt of leaſes which ſhe had no mind to ſell; and having a *full fund* to pay the demand, which the plaintiff had a right to recover if he pleaſed, ſhe, in *conſideration of that fund*, promiſes to pay. I cannot think that this is *not* a ſufficient conſideration. I am of opinion it is amply ſufficient. It is not like the caſe of *Rann* verſus *Hughes*; for there, there were no aſſets, nor any averment of aſſets ſtated in the declaration. But in this caſe there was a full fund; and therefore ſhe was bound in law, juſtice, and conſcience, to pay the plaintiff his legacy.

Mr. Juſtice *Willes*, and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

BULLER juſtice. I am entirely of the ſame opinion. That an action in the courts of *Weſtminiſter-hall*, will, under *ſome circumſtances*, lie for a legacy, is a queſtion which I think can never admit of any ſerious doubt: For there are a number of caſes in the books, from the time of *Henry* VI. to the preſent time, which prove, that under different circumſtances, ſuch action may be maintained. I think there is as little doubt, but that the circumſtances of the preſent caſe, as proved at the trial, were ſufficient to ſuſtain an action; for the legacy was to be paid out of land; and there was an *expreſs aſſent* by the executrix to the legacy. But the evidence which was given at the trial, is not now before the court: We are to decide this caſe upon the face of the record alone.

The plaintiff in his declaration has not ſtated that the legacy was payable out of land; neither has he ſtated any aſſent by the executrix.

The action is brought againſt the defendant in *her own right*; and the declaration is ſimply, that *George Saunders*, by his will bequeathed a legacy to the plaintiff, and made the defendant executrix: That ſhe proved the will, and had *aſſets* ſufficient to pay all the debts and legacies; and by reaſon thereof ſhe became liable to pay the legacy, and being ſo liable, ſhe promiſed to pay it.

To this declaration, two objections have been made in arreſt of judgment. 1*ſt*, That the defendant is not ſufficiently de-

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ſcribed as executrix, and, therefore, there cannot be judgment *de bonis teſtatoris*. 2*dly*, No judgment can be entered *de bonis propriis*; becauſe there was no conſideration for the promiſe; and therefore it is *nudum pactum*.

As to the firſt, I am of opinion, that the plaintiff cannot upon this declaration take judgment *de bonis teſtatoris*. The action is brought againſt the defendant in her *own right*, and *not* as *executrix*. It charges her with a *perſonal* promiſe to pay the legacy, and not upon a *qualified* promiſe to pay as *executrix*, or out of aſſets. And the plaintiff having by his declaration made a perſonal demand againſt her; he muſt ſtand or fall by that, and cannot now reſort to any demand that he may have upon her in the particular character of the executrix.

The forms of pleading are very different where a perſon is charged as executrix, and where ſhe is charged perſonally. In the firſt caſe, ſhe is always named *as executrix* in the beginning of the declaration: She is afterwards ſtated to be liable as *executrix*; and the promiſe alleged to have been made by her *as executrix*. But in the other caſe, ſhe is charged *generally* as any other perſon, and a *general* charge is a *perſonal* charge.

This caſe, therefore, depends wholly upon the ſecond queſtion; whether there be a ſufficient conſideration alleged for the promiſe; or whether the defendant's promiſe be merely *nudum pactum* and void.

The conſideration ſtated for the promiſe is, that the defendant was executrix, and that ſhe had received aſſets more than ſufficient to pay all the debts and legacies. The queſtion is, Whether that be not a ſufficient conſideration?

Under thoſe circumſtances, if there had been *no promiſe*, nor even an *aſſent* to the legacy the defendant might have been *compelled* in a court of equity, or in the eccleſiaſtical court, to have paid it. Whether *without aſſent* ſhe could be compelled in a *court of law*, to pay it or not, is a queſtion which it is not neceſſary to give any opinion upon now; and, therefore, though I have endeavoured to trace out the juriſdiction and the authority of the eccleſiaſtical court from the earlieſt times, and though there is great reaſon to ſuppoſe that the juriſdiction which that court now poſſeſſes in matters of legacy, was originally got by uſurpation on the temporal courts; and though there is a wide difference between allowing to the eccleſiaſtical court a juriſdiction in ſuch matters, and ſaying it ſhall have that juriſdiction excluſive of all other courts; I purpoſely avoid giving any opinion, or even hinting

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hinting what would be the reſult of my reſearches where there is no promiſe or aſſent.

I ſhall give my opinion ſingly on this point; Whether an obligation in juſtice, equity, and conſcience, to pay a ſum of money, be, or be not, a ſufficient conſideration in point of law, to ſupport a promiſe to pay that ſum?

If ſuch a queſtion were ſtripped of all authorities, it would be reſolved by inquiring whether *law* were a *rule of juſtice*, or whether it were ſomething that acts in direct contradiction to juſtice, conſcience, and equity. But the matter has been repeatedly decided.

In *Stone* verſus *Withypool*, *Latch.* 21. the court ſay, "It is an "uſual allegation for a rule, that *every* thing which is a *ground* "for *equity*, is a ſufficient conſideration." So in *Wells* verſus *Wells*. 1 *Vent.* 41. the court *preſumed* an equitable right in the plaintiff, which did not appear on the declaration; and held, that to debar herſelf of that, was a good conſideration.

Theſe authorities alone are ſufficient to ſhew, that the ground taken in the argument at the bar is not large enough.

But to come cloſer to the conſideration now in queſtion, in *Camden* verſus *Turner*. *C. B.* Sittings after *Trin.* 5 *Geo.* 1. *King C. J.* held, that an action *for money had and received*, lay againſt an executor for a legacy, which he had *owned lay ready for the plaintiff, whenever he would call for it.* In that caſe, according to the form of the declaration, the objection did *not* appear upon the *record*; but it was neceſſary for the plaintiff to prove a conſideration at the trial; and if he had not, he muſt have been nonſuited or have had a verdict againſt him. But Lord *King* held, that his *owning the money lay ready*, was an *aſſent*, and *admiſſion of aſſets*, and a ſufficient conſideration.

In *Kecch* verſus *Kennegal*, 1 *Vez.* 125. Lord *Hardwicke* expreſsly holds, that *aſſets* coming to an executor's hands, is a ſufficient conſideration to ſupport a promiſe; and he puts that caſe upon the ſame footing as a promiſe in conſideration of *forbearance*. His lordſhip ſays, "at law, if an executor promiſes to pay a debt "of his teſtator's, a conſideration muſt be alleged, as of *aſſets* "*come to his hands*, or of forbearance; or if admiſſion of aſſets is "implied by the promiſe; otherwiſe it will be but *nudum pac-* "*tum*, and not perſonally binding on the executor."

In *Trevinian* verſus *Howel*, *Cro. Eliz.* 91. it was adjudged, that *having aſſets*, is a good conſideration for a promiſe, and the judgment, which was *de bonis propriis*, was affirmed: And two other caſes are there cited where the ſame point had been ſo determined.

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HAWKES *verſus* SAUNDERS.

*Laſtly*, The caſe of *Atkins* verſus *Hill*, *Eaſter*, 15 *Geo.* 3. *ſupra*, 284. is in point. The declaration was the ſame, and the objection the ſame as in the preſent caſe; and the court unanimouſly held that the promiſe was good, and that the action well lay.

I agree with my lord, that the rule laid down at the bar, as to what is or is not a good conſideration, is much too narrow. The true rule is, that wherever a defendant is under a moral obligation, or is liable in conſcience and equity to pay, that is a ſufficient conſideration. Some of the caſes which I have mentioned, go fully to that extent. But even if the narrow rule which has been mentioned were adopted, as the true rule, yet in this caſe, I think the conſideration is ſufficient; for here is both a loſs to the plaintiff, and a benefit to the defendant, ariſing from that which is the conſideration of the promiſe. The loſs to the plaintiff is, that the effects which are liable to the payment of the legacy have not been ſo applied: but the defendant has detained them in her own hands for other purpoſes. The benefit to the defendant is, that ſhe has received thoſe effects, and has them ſtill. The defendant is bound in conſcience, to apply the effects towards the diſcharge of the debts and legacies: She is a truſtee for that purpoſe; and is guilty of a breach of truſt in not ſo doing: And it is admitted that a breach of truſt is a good ground for action.

Therefore I agree in opinion with the reſt of the court, that this rule in arreſt of judgment, ought to be diſcharged.

*Per cur.* Rule diſcharged.

*Saturday, May* 27th.

## VALE *verſus* BAYLE.

Where a vendee of goods orders a particular mode of conveyance, he muſt ſtand to the loſs, if any happen.

UPON a rule to ſhew cauſe why the *nonſuit* in this caſe ſhould not be ſet aſide, and a new trial granted; *Aſhhurſt* juſtice read the report as follows: This was an action for goods ſold and delivered: At the trial, a letter from the defendant to the plaintiff was produced, containing a commiſſion to the plaintiff for the goods in queſtion, after which was added the following poſtſcript; "Pray be expeditious in ſending them; and inſtead of letting them go by way of *Briſtol*, where many "things you have ſent me have been detained, ſend them by "*land carriage*." The witneſs proved the delivery of the goods to the book-keeper of the *Birmingham* carrier, to be ſent from thence, by way of *Coventry*, to the defendant, who lived at *Carmarthen*

*marthen.* It appeared that there was *no other mode of conveyance by land carriage*, and the goods were loſt on the road. Upon this evidence it was inſiſted, that the delivery of the goods to the carrier, was a delivery to the defendant; but the judge who tried the cauſe being of a different opinion directed a *nonſuit.* 1775. Vaux verſus Bartlett.

Mr. *Buller* ſhewed cauſe. The queſtion is, Whether, under the circumſtances of this caſe, the delivery of the goods to the *Birmingham* carrier, was, or was not, a delivery of the goods to the defendant himſelf. I inſiſt it was not; for as the letter relative to the mode of conveyance, did not contain any directions to the plaintiff, to ſend the goods by any particular perſon, but only an order to convey them by *land carriage generally*; the carrier to whom the plaintiff thought fit to deliver them, muſt be conſidered as the *ſervant* of the *plaintiff*, and not as the *ſervant* of the *defendant*; conſequently the plaintiff was anſwerable for his negligence. If this were a delivery to the defendant, the plaintiff could in no event have countermanded the goods. But ſuppoſe, before actual poſſeſſion of them by the defendant, he had become bankrupt; no doubt but the plaintiff might in that caſe have ſtopped them *in tranſitu*: and would not have been obliged to come in as a creditor only under the commiſſion. This was expreſsly ſettled in the caſe of *Birkett* and others aſſignees *verſus Jenkins*, *Paſch.* 11 *Geo.* 3. *B. R.* The court in that caſe held generally, that whenever goods delivered to the order of the vendee, are only *in tranſitu*, the vendor, in caſe of a failure, may get them back any how he can. Here the goods, at the time they were loſt, were only *in tranſitu*; and, therefore, if a failure had happened, might have been taken back by the plaintiff; conſequently, till actual delivery, they were his goods and his property, and not the property of the defendant.

Mr. *Green* in ſupport of the rule. Wherever a perſon gives another a lawful authority to do an act for him, the perſon who gives the order, is anſwerable for all the conſequences that may attend the execution of it. By the written order, in this caſe, it is plain there had been former dealings between the plaintiff and defendant; and that a particular mode of conveyance had been made uſe of; namely, by way of *Briſtol*: But on account of the goods having been frequently detained, the defendant complains of that mode of conveyance, and at the ſame time deſires the parcel in queſtion, may be ſent *by land carriage.* Now it is admitted, that if a vendee names a *particular* carrier, delivery to that particular carrier, veſts the property in the vendee; becauſe

1775. made in pursuance of his order. Here the defendant expressly directs the goods to be sent by land carriage; and it is in proof, that there was no other mode of land carriage, than that which the plaintiff adopted. If so, this is a particular order on the part of the defendant, and the delivery in consequence of it vested the property in him. And so it would have been, even if there had been more carriers than one, as appears from a case cited in 3 *P. Wm.* 186. where it was held by Lord Chief Justice *Eyre*, "That though a trader in the country does not appoint a carrier "yet if the goods be embezzled, he shall be liable, because he "*leaves it in the breast of the person to whom he gives the order*, "to send them by whom he pleases." Therefore the plaintiff is entitled, and a new trial ought to be granted.

VALE versus BAYLIS.

Lord MANSFIELD. I have a difficulty to find a question in this case; for it resolves itself into this short point; *viz.* Whether, in a dispute between vendor and vendee, the vendor is excused from delivering goods according to the order of the vendee?

His Lordship, after stating the case, said, the material part of the letter is as follows; "I beg you will send them by *land car-* "*riage*, as they are detained a long time at *Bristol* before they ar- "rive." This is an express order to send the goods by land carriage. The plaintiff, in obedience to this order, sends them accordingly, and they are delivered to the book-keeper of the *Birmingham* carrier, at his warehouse in *Coventry*, to be forwarded to the defendant at *Carmarthen*. The box was lost, and the witness said, that before this time his master had always sent goods to the defendant, by the way of *Bristol*, and that there was no other mode of sending them, by land carriage, than by way of *Birmingham*. There was no evidence in contradiction to this. Then what is the case? It is as much as if the defendant had mentioned the *Birmingham* carrier particularly by name; for there being but one carrier, the plaintiff had no choice by whom to send them.

If a vendor take upon himself actually to deliver the goods to the vendee, he stands to all risques; but if the vendee order a particular mode of conveyance, the vendor is excused.

With regard to the question between a vendor, and the general creditors of a vendee, who becomes a bankrupt, as in the case of *Birkett* versus *Jenkins*, a vendor before actual possession by the vendee, has a lien upon the goods he sends; and if he can get them *in transitu*, to be sure he has the benefit of that lien. But that has no relation to a transaction, as this is, between vendor and vendee.

Therefore

Therefore I am of opinion that the rule for ſetting aſide the *non-ſuit* ſhould be made abſolute, and a new trial granted. 1775.

The three other judges concurred.

Rule abſolute without payment of coſts.

VALE *verſus* BAYLE.

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## REX *verſus* JACKSON.

*Monday, May* 29th.

THE defendant had been convicted upon *Stat.* 28 *Ed.* 1. *c.* 20. for making ſilver plate of worſe alloy than the ſtandard alloy of the realm. The indictment contained alſo a count upon *ſtat.* 6 *Geo.* 1. *c.* 11. and a third count for an offence at common law. The defendant was found guilty upon all the counts. In *Michaelmas* term 1774, Mr. *Dunning* moved in arreſt of judgment upon the ground of the *Stat.* 28 *Ed.* 1. *c.* 20. being repealed; when the court took time to conſider, and to look into the ſeveral acts of parliament.

The *Stat.* 28 *Ed.* 1. *c.* 20. which prohibits the making ſilver plate under the ſtandard alloy, is not repealed by any of the ſubſequent ſtatutes againſt the ſame offence: they only add accumulative penalties.

Lord *Mansfield* now declared the opinion of the court, as follows.—This is an indictment againſt the defendant, for making ſilver plate under the ſtandard alloy; and a motion has been made in arreſt of judgment, founded upon this objection, namely, that the *Stat.* 28 *Ed.* 1. *c.* 20. which is one of the ſtatutes againſt which the offence is laid, is repealed. This ſtatute being a prohibitory law, if it be ſtill in force, the proper remedy under it is by indictment. We are all of opinion *it is ſtill in force*, and not repealed or abrogated by any of the ſubſequent ſtatutes ſince enacted. This ſtatute is the firſt ſtatute on the ſubject, and inflicts a puniſhment of *impriſonment*, and by ranſom at the king's pleaſure, on goldſmiths who ſhall make ſilver wares worſe than the ſterling alloy.

The ſterling alloy is eleven ounces two pennyweights of fine ſilver, and eighteen pennyweights of alloy in the pound weight troy; which the mint indenture calls the *right old ſtandard* for the ſilver monies of *England*; and it was in uſe before the conqueſt, as appears by the ſeveral treatiſes on ſilver coins. The *Stat.* 2 *H.* 6. *c.* 14. inflicts a penalty of double the value, on goldſmiths ſelling or ſetting to ſale ſilver wares, worſe than ſterling, or before touched or marked. The *Stat.* 18 *El. c.* 15. inflicts a forfeiture of the value, on goldſmiths working, ſelling, or exchanging ſilver plate, leſs in fineneſs than eleven ounces two pennyweights, or before they have ſet their mark thereto. The *Stat.* 21 *Jac.* 1. *c.* 28. *ſect.* 11. *No.* 45. repeals the words in the *Stat.* 28 *Ed.* 1. "that none ſhall make kings' croſſes or locks." The *ſtat.* 8 *W.* 3.

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8 *W.* 3. *c.* 8. *sect.* 9. made to encourage the then silver coinage, abolished or suspended the *old* standard of eleven ounces two pennyweights, and established the *new standard* of eleven ounces ten pennyweights in it's stead, and inflicted a forfeiture of the plate, or the value thereof, on persons working or putting to sale, or exchanging any manufacture of silver, less in fineness than eleven ounces ten pennyweights, or until marked with the new sterling marks. The *Stat.* 6 *Geo.* 1. *c.* 11. *sect.* 1. and 3. revived and established the old standard of eleven ounces two pennyweights, instead of the new standard eleven ounces ten pennyweights, and continued the new standard penalties for securing the said old standard; and *sect.* 2. enacted that no goldsmith should be obliged to work silver plate according to the new standard. *Sect.* 41. continued both the old and the new standards, and directed them to be marked with distinguishing marks; and subjected offenders to the *penalties and forfeitures* prescribed by *any* of the laws then in *being* concerning wrought plate. The *Stat.* 12 *Geo.* 2. *c.* 26. in the preamble *recites* the statute of 28 *Ed.* 1. 2 *H.* 6. and 18 *Eliz.* and two other acts respecting country assay offices, and recites them *as subsisting laws*; and that notwithstanding the aforesaid acts of parliament, great frauds were daily committed in the manufacturing gold and silver wares, for want of sufficient power effectually to prevent the same: And therefore, *sect.* 1. inflicts a penalty of 10 *l.* for every offence, recoverable by action: But this act says not one word as to the repeal of any of the former laws.

Now it is a general rule, that subsequent statutes which add accumulative penalties, do not repeal former statutes. 6 *Mod.* 140. 11 *Rep.* 63. *b.*

I am furnished with two precedents, one in *Hil.* term 1758, *Rex* versus *John Priest*; the other in *Michaelmas* term 1759. *Rex* versus *Richard Hawkins*; both of which were tried before me, and where the court afterwards, upon motion for judgment, pronounced sentence of *fine* and *imprisonment*, *viz.* in the former 6 *s.* 8 *d.* and six months imprisonment; in the latter 6 *s.* 8 *d.* and three months' imprisonment. No objection was in either of those cases made, nor was there any argument. Therefore, I suppose it was taken for granted, as it is at this time by the goldsmiths' company, that the statute was still in force. We are all of opinion it is in force, and consequently that the indictment is good.

Per cur. *Rule for arresting the judgment discharged.*

THE END OF EASTER TERM.

Trinity

# TRINITY TERM 1775.

## 15 GEORGE III. *B. R.* 1775.

HOGAN Leſſee of HENRY WALLIS, Eſq. and others, *verſus* ROWLAND JACKSON, Eſq. *Tueſday, June* 20th.

ERROR upon a judgment of *B. R.* in *Ireland* in ejectment.

Upon not guilty pleaded, the jury found a ſpecial verdict, the material facts of which were as follow; That the Reverend *George Jackſon*, deceaſed, being ſeiſed of the towns and lands of *Cooliſhall* and *Glanbegg* in *fee*, and of the lands of *Ballyduffultra*, and *Ballygally*, for *lives renewable for ever*, without impeachment of waſte, and of other lands under leaſes for three lives, with reverſionary terms for twenty-one years, from the death of the ſurviving life, named in each leaſe, of *one* of which, *viz.* of a houſe called *Geoghegans*, and ſome *burgeſs* lands, the ſaid *George Jackſon* was the ſurviving life; and being alſo poſſeſſed of perſonal aſſets, to the amount of 1,300 *l.* duly made his will, by which, after diſpoſing of his ſoul and body, he made the following diſpoſition of his eſtate.

One ſeiſed of the lands of *C.* and *G.* in *fee*, and of other lands of *B.* and *B.* for *lives renewable for ever*, and of other lands under leaſes for three lives with *reverſionary terms for* 21 *years*, from the *death* of the *ſurviving life* in each leaſe; and being himſelf the *ſurviving life* in one, deviſes thus: *And as to my worldly ſubſtance*, I give to my mother my houſe and lands of *G.* with the

" AND AS TO MY WORLDLY SUBSTANCE, I give and bequeath " to my dearly beloved mother, *Mary Jackſon*, my houſe and " lands of *Glanbegg*, and all their appurtenances, for and during " the term of her *natural life*, clear and free of any deduction " or charge whatſoever: And alſo the lands of *Ballygally*, " ſubject to the rent only payable thereout, for the term of " her *natural life, without liberty of committing waſte thereon.*"

appurtenances *during her natural life*, clear of any deduction; and alſo my lands of *B.* ſubject to a rent payable thereout, *for life, without liberty of committing waſte thereon*; and after ſeveral legacies and annuities to different relations, to his heir at law, and to the natural children of his brother, deviſes to his mother, *all the remainder and reſidue of* all *his effects*, both *real* and *perſonal*, which he ſhall die poſſeſſed of. The mother by the reſiduary clauſe takes a *fee* in all the teſtator's fee ſimple eſtates, and the whole of his intereſt in the reſt of his real property, ſubject to the charges thereon.

He

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He then gives to *Ellen Corkeran*, the ſum of 30.. to be paid her yearly, during her life, for the ſupport of herſelf and her ſon *George Jackſon*. To her daughter *Ellen*, and her ſon *John Jackſon* reſpectively, the yearly ſum of 20 *l.* to be paid half yearly, till their reſpective ages of twenty-one years; and then he gives them reſpectively the ſum of 500 *l.* He gave the ſaid *George Jackſon* the yearly ſum of 20 *l.* 'till the age of twenty-one; and then the ſum of 400 *l.* All which bequeſts were to be *raiſed* and levied out of his lands of *Glanbegg* and *Cooliſhall*, *Ballygally*, and *Ballyduffultra*. He alſo gave his couſin *Henry Wallis*, the ſum of 1,000 *l.* ſterling, to be paid him as ſoon as conveniently might be after his deceaſe. *To his uncle Edward* Jackſon, the yearly ſum of* 30 *l. ſterling during his life.* He alſo gave unto his uncle *John Wallis*, the ſum of 100 *l.* ſterling. And unto his relation *William Kenah*, and *Jane* his wife, the ſum of 200 *l.* ſterling.

* *Edward Jackſon* was the preſumptive heir of the teſtator.

Deviſe upon which the queſtion ariſes.

And then deviſed as follows, "*I alſo give and bequeath unto* "*my dearly beloved mother, Mary Jackſon, all the* REMAINDER "*and* RESIDUE *of* ALL *the* EFFECTS *both* REAL *and* PERSONAL, "which I ſhall die poſſeſſed of." And concludes with the appointment of *executors*, &c.

That the teſtator died without altering or revoking his ſaid will, leaving *Edward Jackſon* his heir at law; who died inteſtate, leaving the defendant his only ſon and heir at law. That *Mary Jackſon*, under whom the leſſors of the plaintiff claimed, died ſeiſed, &c. That the lands of *Glanbegg* and *Ballygally* were, at the date of the will, of the yearly value of 150 *l.* ſubject to a payment of 45 *l. per annum*, and the woods belonging thereto, worth 200 *l.* That the lands of *Cooliſhall* and *Ballyduffultra*, were of the yearly value of 350 *l.* ſubject to 60 *l.* a year quit-rent; and the woods belonging thereto, in the year 1769, worth 4,500 *l.* That the lands of *Glanbegg* and *Cooliſhall*, were incumbered to the amount of 4,900 *l.* at the date of the will, and 4,500 *l.* at the teſtator's death. That all the legatees were alive at the teſtator's death. That the *yearly value* of the teſtator's *chattels real*, was 30 *l.* and the *groſs* value at the time of making his will, and at his death, was 240 *l.*

The queſtion upon theſe facts was, Whether the leſſors of the plaintiff were entitled?

After ſeveral arguments in the court of *King's Bench*, in *Ireland*, the court gave judgment in favour of the defendant, *Rowland Jackſon*, againſt the opinion of Mr. Juſtice *Robinſon*.

Mr. *Alleyne* for the plaintiff, ſtated the queſtion to be, Whether under the reſiduary clauſe, all the teſtator's real eſtates paſſed to his mother *Mary Jackſon*, in ſo full and ample a degree, as to enable her to deviſe the ſame to the leſſors of the plaintiff? And he inſiſted they did. 1778. HOGAN dem. JACKSON.

*Firſt*, It is apparent, that the great and chief object of the teſtator's bounty was his mother. Therefore, by way of ſecuring a certain proviſion to her, he firſt gives her a life eſtate in two denominations of his real property: he then proceeds to diſpenſe his bounty amongſt all his other relations; and perceiving there was ſtill a ſurplus undiſpoſed of, by one general ſweeping clauſe, he deviſes to his mother every ſpecies of property he ſhould die poſſeſſed of.

*Secondly*, That the teſtator did not mean to die inteſtate, as to any part of his real or perſonal property, is manifeſt, not only from the ſtrong language of the reſiduary clauſe, but from the introductory words of the will, "*As to all my wordly ſubſtance*," which have always been underſtood to include both real and perſonal eſtate, and to indicate an intent in the teſtator, who uſes them, to diſpoſe of all his property. 2 *Vern.* 690. *Beachcroft* v. *Beachcroft*. "*All his worldly eſtate*," compriſes all a man has in the world. *Ibbetſon* v. *Beckworth*, *Forreſter*, 157, "*As touching my worldly eſtate*," in the introductory part of a will, is ſtrong proof that a teſtator means to diſpoſe of all his property.—*Grayſon* v. *Atkinſon*. 1 *Wilſ.* 333. "*As to all my temporal eſtate*," I give, &c. as follows; and afterwards the teſtator concludes thus: "*All the reſt of my goods and chattels, real and perſonal, moveable and immoveable, as houſes, tenements*," &c. without the word *eſtate*, held, to paſs *a fee*.—*Tanner* v. *Wiſe*, "*As to my temporal eſtate*," I deviſe as follows; and afterwards deviſes the *reſt and reſidue* of his *eſtate, goods, and chattels*; held, that theſe words paſſed a *fee*. 2 *Atk.* 37. 3 *Burr.* 1,618.—*Gulliver ex dim. Jefferies* v. *Poyntz*. *Mich.* 11 *Geo.* 3. *C. B.* a deviſe of a *meſſuage*, &c. to *A.* with ſpecial circumſtances, was held to carry arable, meadow, and paſture lands, appurtenant to the ſaid meſſuage. Therefore, any words which indicate an intention of the teſtator to diſpoſe of *all* his eſtate, will take effect and paſs every part of his property.

It may be objected, that the words, "*all the remainder and reſidue*," cannot take in all the teſtator's eſtate, but only ſuch parts of it as are not before mentioned or deviſed. But in *Alleyne*, 28, deviſe of a manor to *A.* for ſix years, and afterwards the reſidue of all his lands to *J. S.* was held to paſs the reverſion of the manor.

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manor. So in *Norton* v. *Ladd.* 1 *Lutw.* 755. upon a deviſe to *A.* for life, and after her deceaſe, the whole remainder of the lands to *B.* it was held, a remainder in fee ſimple paſſed. In *Cheſter* v. *Cheſter*, 3 *P. Will.* 56. *A.* on the marriage of his ſon *B.* ſettled *part* of his lands on *B.* in tail, and being ſeiſed in fee of the *reverſion of theſe lands*, and of other lands in poſſeſſion, deviſes *all his lands* and hereditaments, *not otherwiſe* by him *ſettled or diſpoſed of*: and it was held the reverſion in fee paſſed. He alſo cited *Rogers* v. *Rogers*, *Forreſter*, 268, and *Ridout* v. *Payne*, 3 *Atk.* 486. and prayed judgment of reverſal.

Mr. *Buller*, *contra*. All the caſes cited by Mr. *Alleyne*, are diſtinguiſhable from the preſent, 1*ſt*. It is an eſtabliſhed rule of law, that an heir at law ſhall not be diſinherited, but by expreſs words or neceſſary implication. 2*dly*, It is a ſettled rule in the conſtruction of wills, that the whole of the will muſt be taken together, and nothing is to be rejected which has a determinate and fixed meaning in itſelf. And 3*dly*, Where words uſed by a teſtator are indifferently applicable to real and to perſonal eſtate, they ſhall not be applied to the real, in diſinheriſon of the heir at law.

*Firſt*, There is clearly no expreſs deviſe of the real eſtates. The word *effects* is properly applicable *only* to *perſonal* eſtate. All the dictionaries explain it by the words "*goods* and *moveables*:" And as to the word *real* annexed to it, it can apply only to *chattels real*, which it is found by the verdict the teſtator died poſſeſſed of: ſo that it is not a nugatory or ſuperfluous word. Nor is there any neceſſary implication, that the teſtator intended any greater intereſt in his real property for his mother, than the eſtate for *life* expreſsly limited in the *two denominations*. On the contrary, ſuch an implication would be forced and inconſiſtent: for, to what purpoſe in the firſt part of his will could he want to reſtrain her from *committing waſte*, if it was his intention, in the latter part of it, to give her the abſolute property and dominion over it?

But *ſecondly*, it is contended, that the *introductory* words, "*As* "*to all my worldly ſubſtance*," indicate an intention in the teſtator to diſpoſe of *all* his property; and ſeveral caſes have been cited. As to *Beachcroft* v. *Beachcroft*, 2 *Vern.* 690. and *Ibbetſon* v. *Beckwith*. *Caſ. temp. Talbot*, 157; in both thoſe caſes, the introductory words were, "As to all my worldly *eſtate*;" and ſo were the words of the ſubſequent deviſe in thoſe caſes, "*my eſtate*." Now the word *eſtate*, is a technical, legal expreſſion, and properly applicable to real *eſtates*: and, therefore, a deviſe of "*all a man's* "*eſtate*,"

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"*eſtate,*" has been held to carry a fee, without any words of limitation. But here the introductory words are, "*worldly ſubſtance,*" which are the mere formal words of the ſcrivener, without any legal ſignification annexed to them. At moſt they can only import, that the ſubſequent diſpoſitions in his will relate to his worldly ſubſtance; but they in no wiſe expreſs or imply the extent or *quantum* of ſuch diſpoſitions. The caſe of *Grayſon* v. *Atkinſon*, 1 *Wilſ.* 333. inſtead of being an authority for the plaintiff, is in point for the defendant. For there, Lord *Hardwicke* ſaid, if the teſtator had not, by uſing the words, "*as houſes, gardens, tenements,*" &c. ſufficiently explained what he meant by the "REST *of his goods and chattels* REAL *and perſonal, moveable and immoveable,*" thoſe words would not paſs a fee by the law of *England*, though they might have ſo done by the civil law. *Thirdly*, The words "remainder and reſidue of my effects, "both real and perſonal," do not neceſſarily refer to *real* eſtate, but are equally applicable to *perſonal*; and if ſo, they ſhall not be extended to diſinherit the heir at law. *Pre. Chan.* 471, *Piggot* v. *Penrice*. "There *A.* made one executrix of all his goods, lands "and chattels, and died, not having any *leaſehold* intereſt." Lord *Cowper* ſaid, "whatever his private opinion might be of the intention of the teſtatrix, to paſs her lands, of *inheritance*, yet in point of judgment he could not decree for the executrix; becauſe an heir is never to be diſinherited but by expreſs words, or neceſſary implication."—But 12 *Mod.* 592. is expreſsly in point. There the teſtator being ſeiſed of *five* meſſuages, after making a complete deviſe of *four* of them, ſaid, "*and all the overplus of my eſtate to be at my wife's diſpoſal:*" And it was held, the *fifth* houſe did *not* paſs by this ſtrong reſiduary clauſe. *Trevor*, *C. J.* ſaid, "In the conſtruction of *Wills*, generally the words, "*my eſtate, the reſidue of my eſtate*, or *the overplus of my eſtate*, may well "paſs an inheritance, where the intention is *apparent*: but it "muſt be *very apparent*, and *neceſſary* from the words of the "will. For if the words be indifferent to real and perſonal "eſtate, or may be applied to perſonal eſtate alone, there the "heir at law is not to be diſinherited."—Here, the other parts of the will are ſo far from requiring ſuch a conſtruction, that we deſtroy them if we admit it. The words, in their moſt proper ſenſe, apply, to *perſonal* eſtate: They immediately follow the diſpoſitions which affect *only* the *perſonal* eſtate; and the chattels real, left by the teſtator, ſhew the reaſon for his annexing the word *real* to *effects*; which otherwiſe properly mean *moveables* only,

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only, and fully ſatisfy thoſe words. They ought not therefore to be extended to real eſtate. But ſuppoſe they were applicable to real eſtate, the mother could at moſt take only an eſtate for life, becauſe no words of limitation are added; and without words of limitation, a deviſee of real eſtate can only take an eſtate for life in the premiſes bequeathed to him. He cited alſo *Frogmorton* v. *Wright*. 3 *Wilſ.* 415. and *Wilkinſon* v. *Merriland*, 3 *Crok.* 447-9. in which latter caſe the court held, that a deviſe "of "the reſidue of all his goods, leaſes, *eſtates*, &c. *whereof he was* "*poſſeſſed*," did not paſs *lands* in *mortgage forfeited*; and the rather, becauſe of the words, "*whereof he died poſſeſſed*," becauſe they relate only to *perſonalty*. Here the words are, "*whereof he* "*ſhall die poſſeſſed*."—*Fourthly*, Words of doubtful conſtruction ſhall not overturn former words that are clear and expreſs. *Bamfield* v. *Popham*. 2 *Vent.* 449. 451. 1 *P. Wm.* 54-5. *S. C.* Here, the caſe is not only doubtful, having been argued four times before in *Ireland*; but the deviſe to the mother for life, *without power of waſte*, is incompatible with an intention to give her the ſame land in fee. Therefore, upon the whole, the rules of law muſt take place, and the title of the heir at law be preferred.

Lord MANSFIELD.—There is but one point upon which the whole caſe turns: which is, to fix the meaning of the word *effects* in the *Engliſh* language. It is nugatory to cite caſes, unleſs you fix the meaning of the term to which they are to be applied. If the word *effects* is equivalent to *worldly ſubſtance*, uſed by the teſtator in the beginning of his will, or if it is ſynonimous to property, there is an end of the queſtion: becauſe then all the caſes prove, that the ſweeping clauſe paſſes a fee. On the contrary, if it can be ſhewn that *effects* mean *chattels*, or perſonalty *only*, then the reſiduary clauſe can include them *only*. I take *effects* to be ſynonimous to *worldly ſubſtance*, which means whatever can be turned to value; and, therefore, that real and perſonal effects mean all a man's property.

Mr. *Alleyne*, in reply, endeavoured to ſhew that the words "*real effects*" were equivalent to *real aſſets*, and that real and perſonal effects meant, in the place the teſtator uſed them, all the property he had in the world.

Lord MANSFIELD.—As this cauſe has already been nine years depending in *Ireland*, and as the court has no difficulty upon the queſtion, which turns upon the conſtruction of a very few words of the will, I think it is right that

that we ſhould give our opinion directly, without adding further delay, by deferring it to a ſecond argument. 1775.

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His Lordſhip enumerated the different ſpecies of the teſtator's property, and ſtated the different bequeſts of the will, which he obſerved were material to be attended to in the conſtruction of it, and then proceeded thus:

This cauſe was commenced in the life time of Mrs. *Mary Jackſon*; but ſhe is now dead, and by her will has left the eſtate, which is the particular property in queſtion, to *H. Wallis* the couſin of *George Jackſon* deceaſed (to whom by his will he gave the legacy of 1000 *l.* before-mentioned) and to the three natural children of *Ellen Cockeran*, who are the leſſors of the plaintiff.

The queſtion which ariſes upon this ſpecial verdict and upon the conſtruction of this will is, Whether, by virtue of the ſweeping clauſe, any *real* property at all paſſed to *Mary Jackſon*, the mother of the teſtator? and if any did, Whether any thing paſſed except the *covenant* for the term of 21 years, in the houſe called *Geoghegans* and *Burgeſs* lands thereto belonging, being a title to a *chattel real?* And if the reſt of the real property of the teſtator, or a remainder therein, paſſed, Whether it can paſs for a longer time than during the *life* of *Mary Jackſon*, becauſe there are no words of limitation?

By the *Roman* law, a will conſtituted the *hæres* or heir, and was the appointment of him. He was the ſame perſon as in our law is termed the executor. But the nomination of an heir was ſo eſſential an ingredient of the *Roman* teſtament, that there could be no complete will without him; and from his name and office, he was conſidered, at the death of the teſtator, as univerſal ſucceſſor to all the goods, rights, and property of the deceaſed; *without any regard* or diſtinction as to property acquired by him, *prior* or *ſubſequent to* the time of making his will.

But that is different from the nature of a deviſe of land by the law of *England*, which formerly admitted of no teſtamentary diſpoſition, in caſes of *real* property. This reſtriction took place upon the introduction of military tenures, and was a branch of the feodal doctrine of non-alienation without the conſent of the Lord. But when the rigour of the reſtriction came by degrees to be relaxed, and tenants were permitted to make diſpoſitions by teſtament, a deviſe of lands operated as an appointment to uſes, in nature of a legal conveyance. As ſuch, the courts of law in the conſtruction of them held, that a deviſe affecting lands could operate only upon ſuch real eſtates as the teſtator had at the time

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of executing and publiſhing his will; and not upon any after purchaſed or acquired lands: Becauſe there could be no legal conveyance at common law of what a man ſhould acquire in future.

Another diſtinction, founded upon the notion that a will affecting lands is merely a ſpecies of conveyance, and derived from the ſame ſource, is this. The law of *England*, in the conveyance of real eſtates, requires words of limitation in the donation or grant, to the creation of a fee. Without the word *heirs*, general or ſpecial, no man can create a fee at common law by conveyance. When wills therefore were introduced, and deviſes of real property began to prevail; being conſidered as a ſpecies of conveyance, they were to be governed by the ſame rule. Therefore, by analogy to that rule, in the conſtruction of deviſes, if there be no words of limitation added, nor words of perpetuity annexed, which have been held tantamount, ſo as to denote the intention of the teſtator to convey the inheritance to the deviſee; he can only take an eſtate for life. For inſtance, if a teſtator by his will ſays, I give my lands, or ſuch and ſuch lands to *A.*; if no words of limitation are added, *A.* has only an eſtate for life.

Generally ſpeaking, no common perſon has the ſmalleſt idea of any difference between giving a perſon a horſe and a quantity of land. Common ſenſe alone would never teach a man the difference; but the diſtinction which is now clearly eſtabliſhed, is this: If the words of the teſtator denote only a *deſcription* of the *ſpecific eſtate* or *lands deviſed*; in that caſe, if no words of limitation are added, the deviſee has only an eſtate for *life*. But, if the words denote the *quantum* of *intereſt* or property that the teſtator has in the lands deviſed; there, the *whole* extent of ſuch his *intereſt* paſſes by the gift to the deviſee. The queſtion therefore is always a queſtion of conſtruction, upon the words and terms uſed by the teſtator. It is now clearly ſettled, that the words "*all his eſtate*," will paſs *every thing* a man has: But if the word "*all*" is coupled with the word "*perſonal*" or a *local deſcription*, there, the gift will paſs only perſonalty, or the ſpecific eſtate particularly deſcribed.

All theſe principles being clearly ſettled and certain, the queſtion in this caſe comes to a queſtion of conſtruction upon the will itſelf. Now, in this will, there are ſeveral things which it is material to obſerve. And firſt, the *introduction* is very material. Introductory words cannot vary the conſtruction of a deviſe, ſo as to enlarge the eſtate of a deviſee, unleſs there are words in the deviſe itſelf ſufficient to carry the degree of intereſt contended

contended for. But wherever they aſſiſt to ſhew the intention of the teſtator, the courts have laid hold of them, as they do of every other circumſtance in a will, which may help to guide their judgment to the right and true conſtruction of it. The introductory words uſed by the teſtator in the preſent caſe are not ſtrict legal terms; but they are the words of a plain man of ſound learning. He ſays, "*As to all my worldly ſubſtance*, I give, *&c.*" What is *ſubſtance?* It is *every property* a man has. So, in the *Statute* 4 and 5 *Phil.* and *Mar. c.* 8. for the puniſhment of ſuch as ſhall take away maidens that be inheritors, the word *ſubſtance* is made uſe of, and means *worldly wealth.*

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Thus the teſtator ſets out. He then proceeds to diſpoſe of his property, and in the courſe of his will provides for every body: For his mother, his uncle, his miſtreſs, his natural children, his couſins; and makes a particular proviſion for his heir at law, which proviſion is to continue *during his life.* To be ſure, that circumſtance alone would not exclude the heir from taking any thing not diſpoſed of. But it furniſhes an argument in favour of the conſtruction contended for by the repreſentatives of the mother; namely, that he intended the remainder of every thing to go to her by the ſubſequent reſiduary deviſe; and that he did not mean to die *inteſtate* as to any part of his property. He adds the ſweeping clauſe, after all the proviſions before mentioned; at the ſame time not meaning to make his mother executrix. What purpoſe then was it to anſwer? I confeſs I can ſee none, unleſs it were to diſpoſe of all his worldly ſubſtance agreeable to his declaration in the introductory part of the will. The words are, "I alſo give to my mother all the *remainder* and *reſidue* of "*all* the *effects*, both *real* and *perſonal*, which I ſhall die poſſeſſed "of." Now, is the true conſtruction of theſe words to be confined to a gift of *perſonalty* only? Moſt clearly not; becauſe the teſtator has expreſsly added the word *real* to the word *effects.* Do the words *real effects* in law, mean *real chattels only?* No authority has been produced to ſhew that they do: And in point of fact, there was but one leaſe belonging to the teſtator in this caſe which could come under that deſcription: Conſequently, if the conſtruction contended for by the defendant were the true one, only that leaſe would paſs; which would be to narrow the conſtruction of the word *real* very much indeed. The natural and true meaning of *real effects* in common language and ſpeech is real property; and *real* and *perſonal effects* are *ſynonimous* to *ſubſtance*, which includes every thing that can be turned into money.

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In ſeveral clauſes of the bankrupt laws which make it felony in a bankrupt to conceal, remove, or embezzle any part of his goods, wares, merchandize, monies or *effects* *; the word "*effects*" is made uſe of in this ſenſe. If that be the true conſtruction, there can be no doubt, but that the words, *remainder* of *real effects*, include the reverſion of every thing not diſpoſed of; in which caſe, no words of limitation were neceſſary.

* Vide ſtat. 4 & 5 *Ann.* c. 17. *ſect.* 1. ſtat. 5 *Ann.* c. 22. *ſect.* 1. ſtat. 3 *Geo.* 2. c. 12. *ſect.* 2. ſtat. 5 *Geo.* 1. c. 24. *ſect.* 1. ſtat. 5 *Geo.* 2. c. 30. *ſect.* 1.

But an objection has been made from the teſtator's giving his mother a *ſpecific eſtate* for *life*, and making that eſtate liable to *impeachment of waſte*; which, it has been ſtrongly contended, is totally repugnant to and inconſiſtent with an intention to give her the abſolute property in a ſubſequent part of the ſame will. As to that, there might poſſibly be reaſons for his doing ſo, eſpecially as he had, in reſpect of that ſpecific eſtate, given her a preference to all his general creditors and legatees; by deviſing it free of all incumbrances. But I do not think the objection of *itſelf* ſufficiently ſtrong, to controul the manifeſt operation of the ſubſequent words, uſed by the teſtator in the reſiduary deviſe. It would be going a great way indeed, to lay it down as a general rule, that where a particular eſtate is given to a perſon in one part of a will, and the teſtator afterwards deviſes to him in more general words, that he ſhall not reap any benefit of ſuch reſiduary deviſe. Indeed, as to this objection, the caſe of *Ridout* v. *Paine*. 3 *Atk.* 486. is exactly in point. There, the teſtator, in the firſt inſtance, gave his wife only an eſtate *for life*, in *part* of his real eſtate, and afterwards bequeathed her the *reſidue*, &c. The objection of inconſiſtency, now ſo ſtrongly relied on, was there made; but Lord *Hardwicke* over-ruled it, and held the reſiduary clauſe carried the inheritance notwithſtanding. That caſe is alſo very near in point as to the other objections made to day. For the only difference between the ſweeping clauſe in that caſe and this, is, that the word *eſtate* is uſed inſtead of *effects*. Here the words are, "All the remainder and reſidue of all his "effects, both real and perſonal," which includes all the teſtator's property. All the terms he makes uſe of, except the word "*effects*," are technical terms: For *remainder* is applicable to *real* eſtate, and *reſidue* to *perſonal* eſtate. Therefore the ſame rule of determination that was held in the caſe of *Ridout* v. *Paine*, ought to hold in this caſe. Upon the whole of the will taken together, I am clearly of opinion, that the teſtator meant his mother ſhould take the whole of his property, under the reſiduary deviſe, and that the words he has made uſe of are ſufficient

sufficient to effectuate that intention: Consequently that she took a fee in the fee-simple estates, and the whole of the testator's interest in the rest of his real property, subject to the charges thereon. The result is, that the lessors of the plaintiff are entitled, and that the judgment of *B. R.* in *Ireland* must be reversed. 1776.

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*Aston*, Justice. I am of the same opinion as I was before *. When this question came on in the *Common Pleas*, in *Ireland*, the mother was alive; therefore it was immaterial whether she took an estate for life or in fee. The words "*real effects*" may relate to real estate; and there are many acts, both in the *English* and *Irish* statutes, in which they can relate to nothing else. So, the word "substance" is applicable to real estate, in the *statute* 4 and 5 *Phil.* and *Mar. c.* 8. I think the intention of the testator in this case is very clear. Therefore, the judgment must be reversed.

* Mr. Justice *Aston* was Chief Justice of the *Common Pleas* in *Ireland*, when the question was agitated there.

Mr. Justice *Willes*, and Mr. Justice *Ashhurst* were of the same opinion.

*Per cur.* Judgment reversed.

Afterwards, upon a writ of error in the House of Lords, on the 2d of *December* 1776, the judgment of *B. R.* reversing the judgment of the court of *B. R.* in *Ireland*, was affirmed.

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BALDWIN *versus* KARVER *et al'.*

*Tuesday, June* 20th.

THIS was a case out of Chancery for the opinion of this court; the material facts of which were as follow:

*Richard Ashwin* being seised and possessed of a considerable real and personal estate, made his will on the 8th of *June* 1756, and thereby, after making provision for his wife, and leaving certain legacies, divided the residue of his estate thus: "I do hereby "give and bequeath all the rest, residue, and remainder of my "personal estate and effects whatsoever, not herein before, or "herein after bequeathed, unto my said wife, *Sarah Ashwin*, "*Thomas Taylor*, and *John Karver*, *to hold* all and singular the "said lands, tenements and premises, and personal estate what-"soever, to them my said trustees, and the survivor and survivors "of them, and the heirs, executors, and administrators of such "survivor, in *trust* nevertheless, that they, my said trustees, and

Devise to trustees, in trust for the use of the *heirs male* of *J. A.* in *default of such issue*, to the use of the *heirs male* of *R. A.* and in default of such *issue male*, to the use of *all* and every the *grand children* of *J. A.* and *S. M.* as tenants in common. By a codicil bearing even date with the will, the testator directs the trustees to pay the *interest* and *produce* of his *real* and personal estate to his wife *S. A.* and to the said *J. A.* and *R. A.* during their lives, with survivorship. *Eight* grand-children were alive at the *date of the will*: a *ninth* was born *before* the testator *died*: *twelve* more were born after his decease, and *all* in the life time of *R. A.* who died without issue.—Held, that as the *twenty-one grandchildren* were *all alive* at the *death* of *R. A*, *all* were equally entitled.

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" the ſurvivor and ſurvivors of them, and the heirs, executors, " and adminiſtrators of ſuch ſurvivor, do, and ſhall ſtand ſeiſed " and poſſeſſed of the ſaid lands, premiſes, and perſonal eſtate " and effects, *to and for the uſe* and behoof of the *heirs male of* " *the body* of my nephew *John Aſhwin*; and in default of ſuch " iſſue male, then to the uſe and behoof of the heirs male of the " body of my nephew *Richard Aſhwin*; and in default of *ſuch* " *iſſue*, then to and *for the uſe* and behoof of *all and every the* " *grandchildren* of my late brother *John Aſhwin*, deceaſed; and " the grandchildren of my late ſiſter *Sarah Morris*, deceaſed, *to* " *hold* all and ſingular the ſaid lands and premiſes, to them the " ſaid grandchildren of my ſaid brother *John Aſhwin* and *Sarah* " *Morris*, and their heirs, as tenants in common, and not as joint " tenants; and my *perſonal eſtate* and effects, to be equally divided " between them, *ſhare and ſhare alike.*"

That the ſaid teſtator added three ſeveral codicils to his will, the *firſt* of which was as follows: Whereas I *Richard Aſhwin* have this 8th day of *June* 1756, made and executed my laſt will, but I have therein omitted to diſpoſe of the reſidue and increaſe of the ſurplus, and remainder of my real and perſonal eſtate; now I do hereby order, will, and direct, that my ſaid truſtees herein named, ſhall pay and diſpoſe of all the intereſt, and produce, and increaſe, that ſhall from time to time ariſe, or be made of my ſaid real and perſonal eſtate, unto my ſaid wife *Sarah Aſhwin*, and my nephews *John Aſhwin* and *Richard Aſhwin*, and to their aſſigns, ſhare and ſhare alike, with ſurvivorſhip, for and during the term of their three natural lives.

That the teſtator died on the 6th of *November* 1758, leaving *John Aſhwin* and *Richard Aſhwin* his nephews, and the ſaid *John Aſhwin* his heir at law.—That the teſtator's ſaid nephews, *John* and *Richard Aſhwin*, are ſince dead without iſſue, and *Sarah Aſhwin*, the widow, is alſo ſince dead, and that *Richard Aſhwin* was the ſurvivor of them.

That *eight grandchildren*, viz. *two* of *Sarah Morris*, and *ſix* of *John Aſhwin*, were alive at the time of the teſtator's making his will. A *ninth*, *viz.* a grand daughter of *John Aſhwin*, was born after the will, and *before* the teſtator died. After his deceaſe, *twelve* more grand-children of *John Aſhwin* were born, and *all* of them *in the life-time* of *Richard.*

The queſtion was, Whether all, or any, and which of the grandchildren of the teſtator's late brother *John Aſhwin*, and his ſiſter *Sarah Morris* deceaſed, were entitled under this deviſe?

This

This caſe was argued twice: firſt on *Friday February* 3d in *Hilary Term*, 15 *Geo.* 3. by Mr. *Pepys* for the plaintiff, and Mr. *Wallace* for the defendants; and again, in *Eaſter Term* laſt, by Mr. *Dunning* for the plaintiff, and Mr. *Mansfield* for the defendants. 1775. BALDWIN *verſus* KARVER.

For the plaintiff it was argued, that thoſe grandchildren *only* who were *alive at the date of the will*, or at moſt the *other* grandchild born after the will, and *before the teſtator's death*, could be entitled; and ſuch was the rule eſtabliſhed by all the authorities in the books, in caſes where, like the preſent, there were no peculiarity of circumſtances to guide the court as to the real intention of the teſtator.

That the will and codicil being both executed on the ſame day, muſt be taken together; but ſo as not to loſe ſight of the order of time. That by the will, no legal eſtate was veſted in the truſtees, but by the codicil they had a good eſtate of freehold during their lives; and there was a veſted remainder in the *nine* grandchildren born in the life-time of the teſtator, ſubject only to a contingent remainder to the iſſue male of *John* and *Richard*.

Lord MANSFIELD. The ſingle queſtion is, *which* of the grandchildren are entitled, not what eſtate they are to take.

Mr. *Pepys*. But there was a remainder veſted in thoſe who were alive at the teſtator's death: For it is an eſtabliſhed rule of law, that wherever an eſtate of freehold is limited to a perſon for life, with contingent remainders, and an ultimate remainder in fee to a perſon in *eſſe*, if none of the intervening remainders amount to a fee, the ultimate remainder is veſted. *Chudleigh's Caſe*, 1 *Rep.* 137; and till the contingent remainder takes place, the right of timber upon the lands is in the ultimate remainderman. *Uvedale* verſus *Uvedale*, 2 *Roll. Abr.* 119. *tit. Mæreſme*, *pl.* 3. the doctrine of which caſe is recognized in *Whitfield* verſus *Bewit*, 2 *P. Wms.* 240. Therefore, upon theſe authorities, there was clearly a veſted remainder in the grandchildren alive at the time of the teſtator's death; and if veſted, it could not be deveſted by any other grandchildren who might afterwards come in *eſſe*.

Secondly, With reſpect to the *intention* of the teſtator, and the *inconvenience* that would ariſe from extending the limitation to *all* the grandchildren who might exiſt *in futuro*, they contended, that it was more natural for the teſtator to mean ſuch grandchildren only as were then in being, and whom he knew, than thoſe who might afterwards be born, who were indefinite in number, and the time of their coming in *eſſe* ſo uncertain, that

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either the grandchildren alive muſt wait till their number could be aſcertained before any diviſion, or there muſt be a new partition upon the birth of every additional child. Beſides, in that caſe, if any of them were to die, their father would come in as adminiſtrator, contrary to the manifeſt intention of the teſtator. — They cited 2 *Atkins*, 121. 1 *Vez.* 114.—*Pre. Chan.* 470, and 1 *P. Wms.* 342. and *Gilb. Caſes in Equity*, 136. *S. C.*

For the defendants it was contended, that the apparent intention of the teſtator was to include *all* the grandchildren of *John* and *Sarah*, who ſhould be alive at the *death* of *John* and *Richard without iſſue*. That in reſpect of the real eſtate it was clearly a good remainder; and as to the deviſe of the perſonal, it was within the rule of *contingencies* with a double aſpect.

As to the queſtion, *which* of the grandchildren were entitled, the benefit intended by the teſtator was clearly a future and contingent benefit; becauſe, till the death of *John* and *Richard* without iſſue, nothing was given to any of the grandchildren; and therefore, till then nothing veſted: Conſequently the teſtator intended, that all who were in *eſſe* at that time ſhould take. That the rule of law, as to the time of veſting, was not, as had been contended on the other ſide. But ſuppoſing this eſtate in common did veſt in the grandchildren alive at the teſtator's death, yet it might be deveſted in the event of future grandchildren coming in *eſſe*: Becauſe the eſtate both of tenants in common and joint-tenants, may veſt at different periods. *Co. Lit.* 188. *a. Moore*, 220. *Stanley* verſus *Baker*. *Pollexfen* 373. 2 *Vern* 545. *Cooke* v. *Cooke*. 1 Ld. *Raym.* 310. 2 *Str.* 1172.

Upon the firſt argument, Lord *Mansfield* ſtarted a doubt, whether the deviſe of the *perſonal* eſtate to the grandchildren was not *too remote*.—Upon the ſecond argument his Lordſhip ſaid, I have no doubt as to the queſtion which of the grandchildren are entitled.—All caſes on the conſtruction of wills depend upon the particular penning of the wills themſelves, and the ſtate of the families to which they relate, taking alſo into conſideration ſome general rules to prevent property from being unalienable too long.

A *grandchild* may mean one that a perſon may have at *any diſtance of time*, according to the manner in which the teſtator uſes the word. The great point in all caſes of this kind is, the *time* when the legacy is to *veſt*; for that is the period which the teſtator looks forward to, when he directs his property to paſs from one channel into another. Here the teſtator does not conſider

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ſider the grandchildren as *immediate* objects of his bounty; but only gives them a *poſſibility* or a chance, after an indefinite dying of *John* and *Richard* without iſſue male. He means them as another ſucceſſion; and, therefore, *all* who were *in eſſe* upon that contingency are equally entitled.

But my difficulty is upon the limitation of the real and perſonal eſtate. The rule of law moſt undoubtedly is, that a deviſe to the heirs general or ſpecial of a man alive is void. If the deviſe therefore to the heirs of the body of *John* is to be conſtrued an immediate deviſe, it is of courſe void. But ſuppoſe, by incorporating the will and codicil together, the deviſe of the real eſtate could be ſupported; ſtill it ſtrikes me, as at preſent adviſed, that the ſubſequent limitation of the perſonalty is too remote. Therefore let notice be given to the heir at law of the teſtator, and to the perſonal repreſentative or next of kin of *John*, that they may be heard by their counſel if they think proper.

ASTON Juſtice—As to the queſtion which of the grandchildren are entitled, the material conſideration in all the caſes in the books has been, the time when, or the contingency upon which, the deviſees are to take: and beyond that time none have been let in. *Heath* v. *Heath*. 2 *Atk.* 121. Warren *verſus* Johnſon, 2 *Ch. Rep.* 69. Elliſon *verſus* Airey, 1 *Vez.* 114. Where there is a deviſe to the *children* of *A.* who has only *one* child born at the time of the will, *all* the children *born after* may be let in. *Bateman* v. *Roach*, 9 *Mod.* 104.

*Adjornatur.*

But now in this term, no counſel appearing for the heir at law or the perſonal repreſentative of *John*, Lord *Mansfield* delivered the opinion of the court as follows:

A doubt occurred upon both arguments, whether *any* of the grandchildren at all were entitled. *Firſt*, In reſpect of the real eſtate, as being deviſed to the *heirs male* of *John*, who was alive at the death of the teſtator: and, *Secondly*, In reſpect of the perſonal eſtate, as being too remote.—As to the firſt, it was ſaid, that the codicil, by which the rents and profits are given to *Sarah*, *John*, and *Richard*, during their lives, was made to obviate this objection; and if ſo, they would take a joint eſtate during their three lives, with limitation in tail male to *John* and *Richard*, with remainder in fee to the grandchildren. But in that caſe, the ſubſequent deviſe of the perſonalty would be too remote: for *John*, as being the firſt tenant in tail, would take the abſolute property.

Upon

1775. Upon the laſt argument it was ſaid, that the deviſe of the real and perſonal eſtate might be conſidered as a deviſe upon a *double* contingency; that is, in caſe *John* ſhould have a ſon living at his death, then to ſuch ſon; but if none, then to the grandchildren.

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Upon that way of ſtating it, it does occur that the whole may be ſupported. It is clear by the *will*, that nothing was meant to paſs to *John* the anceſtor; the deviſe is to the *heirs male of his body*. But thoſe words are followed by others, which ſhew that the teſtator meant to uſe them as *ſynonimous* to "*iſſue male*:" For he goes on thus; "and in default of *ſuch iſſue male*." Suppoſing he did uſe them as *ſynonimous*, to be ſure the reaſonable conſtruction is, that he meant ſuch perſon as ſhould be iſſue male at the time of the death of *John*, and if he left no iſſue, then to the grandchildren.

As to the queſtion, *how many* of the grandchildren are to take, it muſt in all caſes depend upon the ſubject matter of the will. The doctrine is very well laid down in the caſe of *Elliſon* verſus *Airey*, 1 *Vez.* 114. Where one deviſes to *children*, if it be an *immediate* deviſe, there it ſhall only be intended to relate to children *in eſſe* at the time. There is a material diſtinction between this ſort of bequeſt, and a proviſion for children in marriage ſettlements: becauſe in them, as there are no children *in eſſe* before the marriage, and the number is uncertain, it muſt be ſuppoſed the benefit was intended equally for all. But if in a will, a deviſe is limited to *children* by way of a remainder, or upon a contingency which in the contemplation of the teſtator is uncertain *when* it may take place, if it ever happens at all; there the ſame reaſon holds, why it ſhould not be confined to thoſe only who were alive at the time of making the will. Here, the deviſe is a remainder after two eſtates tail. Therefore we are clearly of opinion that all the grandchildren *in eſſe*, at the time when the deviſe veſted, were equally entitled to take; which in fact includes all who are before the court, for they were all alive at the death of *Richard*.

If either *John* or *Richard* had had a ſon living at their death, there would have been an end of the limitation over.

June 23. The certificate was in theſe words *: "Having heard counſel "on both ſides, and conſidered this caſe, a doubt occurred, whe- "ther the deviſe of the real *eſtate*, as it ſtands upon the *will* "*alone*, was *good*; and if it was coupled with the codicil, whe- "ther the abſolute property of the *perſonal eſtate* would not veſt "in

" in *John*: and, therefore, we directed notice to be given to the " heir at law of the teſtator, and the perſonal repreſentative or " next of kin to *John*, that they might be heard by counſel if " they pleaſed. But the cauſe having been poſtponed to this " term, and no counſel appearing for them, we have thought " proper to give our opinion upon the queſtion, as between " the grandchildren themſelves. And, as they were *all in being* " at the *death* of *Richard*, we think they were *all* equally en- " titled."

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## REX *verſus* GRUNDON *et al'*.

*Wedneſday, June* 21ſt.

THIS was a ſpecial caſe reſerved upon an indictment againſt the defendant and others, for an aſſault upon *Charles Crawford*, Eſq; a *fellow-commoner* of *Queen's College* in the Univerſity of *Cambridge*, in turning him out of the garden belonging to the ſaid College.

Sentence of expulſion unappealed from, given in evidence on an indictment for aſſaulting a *fellow commoner* of Queen's College *Cambridge*, by turning him out of the college garden; and held *concluſive* for the defendant.

Caſe.—On the trial, evidence was offered on the part of the proſecutor, to ſhew the illegality of the ſeveral ſentences of expulſion of the proſecutor from the ſaid college, and of the confirmation of the ſaid ſentences; but of which confirmation no notice was given to the ſaid proſecutor.

If the court of King's Bench ſhould be of opinion that ſuch evidence was admiſſible on the trial of the ſaid indictment, then the parties on both ſides were to produce to the court, ſuch part of their ſtatutes or other inſtruments, as might be proper to ſupport or invalidate ſuch ſentences; that the ſaid court might judge of the legality or illegality of the ſaid ſentences, or either of them, for the ſaid proſecutor's expulſion from the ſaid college.

The queſtions reſerved for the opinion of the court were, *1ſt.* Whether ſuch evidence, as above ſtated, given on the trial of the ſaid indictment, was admiſſible or not. *2dly*, Whether, if ſuch evidence was admiſſible, the ſaid ſentences, or either, and which of them, were legal for the proſecutor's expulſion from the ſaid college.

The cauſe came on before the court laſt term, when Mr. *Jones* for the proſecutor had begun. But Lord *Mansfield* ſtopped him, ſaying, that upon the caſe, as then ſtated, nothing appeared to the court of the foundation of the college, or of their juriſ-

1775. diction, or of the ſtatutes, or of the facts; all of which were neceſſary to be ſtated to enable the court to form a judgment upon the queſtion reſerved. His Lordſhip ſaid, if the proſecutor were a *member* of the *foundation*, the ſentences might be concluſive until reverſed by the viſitor. If only an *independent* member, it might be defenſible in thoſe who had the management and direction of the college to put him out.

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The caſe was now made compleat by the addition of the *order* of *ruſtication* of the proſecutor, dated *Auguſt* 21ſt, 1773, ſigned by the Maſter and *one* Fellow; the *ſentence* of *expulſion*, dated *September* 27th, 1773, made by the Maſter and *two* Fellows, but ſigned only by the Maſter; the *order* of *confirmation* of the ſame dated *January* 13th, 1774, ſigned by the *Maſter* and *ten* Fellows. Alſo a copy of the ſtatutes of the college, of which the ſtatute *de perendinantibus* only was material, and an interpretation of the words, "*Major pars ſociorum*," which occurred frequently in the ſtatutes, and which, by ſuch interpretation, was conſtrued to mean the *major part* of the Fellows *reſident* in college. The ſtatute *de perendinantibus* was as follows: "Statuimus quod "nullus ad *perendinandum* in hoc collegio admittatur, niſi de "expreſſo conſenſu preſidentis, et *majoris partis ſociorum*; quibus "conſtet de ipſius bonâ famâ converſationeque laudabili, et "quem crediderint quiete victurum inter ſocios. Et ſi oppoſi- "tum conſtiterit poſt ejus ingreſſum, primò admoneatur per pre- "ſidentem vel ejus vicegerentem; et ſi tunc non emendatur, mo- "neatur ſecundo per duos ſocios tunc domi preſentes; quod ſi "adhuc non ſe reformaverit, tertio per preſidentem et *majorem* "*partem ſociorum* expellatur a collegio in perpetuum. Quod ſi "quiſque perendinantium aliquod crimen committat unde ſcan- "dalum aut infamia eidem collegio oriatur idem ab hoc collegio "protinus expellatur."

Mr. *Jones* for the proſecutor propoſed to maintain, 1*ſt*, That the ſentence of expulſion was examinable in this court. 2*dly*, That it was irregular, and conſequently illegal.

Upon the *firſt* point: Colleges are ſocieties inſtituted, not merely for the purpoſe of diſturbing the founder's property, but, like all other corporations they have, for their object, the public utility. They may then be conſidered in two different capacities: 1. corporate; 2. eleemoſynary. In each of theſe characters, they are ſubject to a different juriſdiction. In matters which concern their public, their corporate character, they are controllable like every other

other corporate body, by the general law of this country: In matters which regard their private or eleemoſynary character, their proceedings are examinable by perſons appointed by the founder, their reſpective viſitors. 1775. REX *verſus* GRUNDON.

Theſe inſtitutions are in general compoſed, not only of members who participate of the endowment, but of others who do not. The latter, however, are conſidered ſtrictly as members of the college. The terms of their admiſſion, their rank, their habits, their privileges, their diſcipline and regulation, the cauſes for the cenſure or expulſion of them are defined and preſcribed by the ſtatutes, which form the general conſtitution of the college. In virtue of this relation, they claim to be members of the Univerſity, or aggregate Corporation compoſed of the members of the different colleges. In this character they are ſubject to further regulations, and in return receive eſſential advantages: they become entitled to different degrees, diſtinctions, and valuable privileges in the learned profeſſions, and to a qualification as electors or repreſentatives for the Univerſity in Parliament.

There is nothing which eſſentially differences the particular conſtitution of Queen's College from that of any other. It was firſt founded by *Margaret* of *Anjou*, queen of *Hen.* 6. and afterwards further endowed by *Elizabeth*, wife to *Ed.* 4. The foundation conſiſts of a maſter, 19 fellows, and 8 ſcholars. Mr. *Crawford* the preſent proſecutor, claims no part of the endowment, but was duly admitted a member of the college.

If the ſentence by which Mr. *Crawford* is deprived of the rights incidental to his character as a member of the college, be not examinable in this court, he is *without remedy*. For the province of the viſitor is confined to caſes in which the founder's property is concerned. This was ſettled in *Daviſon's* caſe*. It was there determined, that members of the proſecutor's deſcription have no appeal to the viſitor's juriſdiction, But it is ſufficient that the proceeding is without redreſs in any other juriſdiction, to render it amenable to this court, which ever interpoſes to prevent a defect of juſtice to the ſubject. This principle is declared in the Great Charter, and expreſsly recognized in *Bagg's* caſe, 11 *Co.* 98. It was there reſolved, "that to this court of "King's Bench belongs not only authority to correct errors in "judicial proceedings, but errors and miſdemeanors likewiſe extrajudicial, tending to the breach and oppreſſion of the ſubject, "or to raiſing any faction or debate, or any manner of miſgo-

* In Canc. 25th July, 1772.

"vernment;

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verſus
CAVENDISH.

"vernment; *in order that no manner of wrong or injury, public* "*or private, may be done, but may be remedied by due courſe of* "*law.*"

This is the caſe of a corporation, inſtituted for the improvement of the public manners, by the inſtruction of youth, and the advancement of uſeful learning, exerciſing powers which are an emanation from this court. In this view it is clearly ſubject to the authority of this court, which is not only inveſted with a controlling power over all corporations, but is alſo the national *cuſtos morum*, the ſuperintending guardian of the public morals.

This court will, therefore, not conſider itſelf as precluded from an examination of this ſentence, and a declaration that it is irregular, if it ſhould be ſo found, which is all that the preſent caſe demands. For the queſtion in the preſent proceeding is ſimply, Whether the ſentence be really a regular ſentence of expulſion? If it is not, the defendants are guilty; if it is, they muſt be acquitted.

*Second* point. The ſentence is clearly irregular. The ſtatute *de perendinantibus*, which provides for the regulation of thoſe members of the college who are *independant* of the endowment, directs the mode of their admiſſion to, and expulſion from the college. For a very obvious reaſon, the ſame deſcription and number of perſons, which is requiſite to their admiſſion, is made neceſſary for their expulſion; the Maſter and the *major part* of the Fellows. Now this ſentence of expulſion is only by the Maſter and *one* Fellow; the ſecond ſentence, indeed, is by a Maſter and *two* Fellows, which evidently, however, do no not conſtitute a majority.

Mr. *Pemberton*, *contra*, for the defendant. *1ſt* Point. It is a general rule of law, that a ſentence or judgment of any court or authority, having competent juriſdiction, is concluſive until reverſed. *Carth.* 225. *Buller's Ni. Pri.* 244. 1 *Salk.* 290. *Blackham's* caſe. The propriety, therefore, of this ſentence of expulſion, could not be enquired into collaterally at *niſi prius* upon this indictment.

2*d* Point. The ſentence is a good and valid ſentence. As to the ſtatute *de perendinantibus*, a *fellow commoner* cannot be conſidered as a *perendinans*. But ſuppoſing he could, the interpretation of the ſtatutes is given to the Preſident and the major part of the Fellows: and the interpretation they have given to the term *major part*, is, that it means the majority of the Fellows *preſent* in college. Therefore this ſentence though ſigned by the

the Maſter and one Fellow only, being the only Fellow in college, is ſtrictly regular and legal. 1775.

*Cur. adviſare vult.* REX verſus GAUNDON.

Afterwards, on *Monday June* the 26th, Lord *Mansfield* delivered the opinion of the court. His Lordſhip ſtated the caſe at large, and proceeded thus:

The proſecutor, after theſe proceedings, continued by force, and in deſpite of the college, until *July*, when the fact for which the indictment is brought happened. But he had never before made any complaint about the proceedings, nor appealed to the viſitor. The queſtion upon theſe facts is, Whether, after the proceedings ſo had againſt him, he had a right to continue in the college? It has been argued, that he was a *mere boarder*; and if ſo, that he had no right to continue after the notice given him to leave the college; and we all think that he appears to be a *mere boarder*. Mr. *Jones* has furniſhed me with a caſe which ſeems deciſive as to this point, and is as follows:—*Ex parte John Daviſon*, Eſq; in Chancery at Lord *Apſley*'s houſe, *July* 25th, 1772. Mr. *John Daviſon* was admitted a *commoner* of Univerſity college in *Oxford*, and after having performed the greateſt part of his public exerciſes, and having kept all the terms, within one, requiſite for the purpoſe of taking the degree of Batchelor of Arts, he was expelled the ſaid college. *Daviſon's caſe.* *Commoner of Univerſity College in Oxford is a mere boarder.*

He preferred his petition to the Lord Chancellor as viſitor; Univerſity college being of royal foundation, and the petition ſtates—That Univerſity College was a foundation of King *Alfred*, *anno*, 872.—That by *charter*, the ſaid college doth now conſiſt of a *maſter*, 12 *fellows*, and *other* members.—That he was admitted according to the tenor of the charter; that he was expelled by the maſter and *five* fellows, which does not conſtitute one half of the fellows of the college.—The appellant, therefore, prayed, that the matter might be taken into conſideration; that the maſter and fellows might be ordered to attend; and that the charters, books, and ſtatutes might be inſpected and produced at the hearing of the petition; and, in general, that the appellant might be redreſſed. *Petition.* *Prayer.*

The Lord Chancellor ordered, that the parties ſhould attend, and that the public books, *&c. &c.* ſhould be inſpected. Upon this, the college preſented a counter-petition, ſuggeſting, that certain allegations in the appellant's petition are unſupported by evidence, particularly theſe:—"That the college now conſiſts by "*charter*, of a maſter, 12 fellows, and other members:—That *Order 15th April*, 1772. *Croſs-petition.*

"your

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" your petitioner was admitted a member pursuant to the char-
" ter." Whereas they shew, that the college is a corporation by *prescription*, though confirmed by several royal charters. That it is an *eleemosynary corporation*, and consists *only* of a *master* and 12 *fellows*: that they are advised, and do submit that *commoners*, *i. e.* such as pay for their lodging and diet, and are independant, *do not belong to the college*, nor are of the foundation: that they are, of course, not entitled to the protection of the visitor, and can have no title to the production of the college papers. They

Prayer. therefore pray, that they may be heard against the petition of the said *Davison*; and that so much of the above order as relates to the inspection and production of the college books, *&c. &c.* may be suspended, till it be determined " whether this be matter of
" visitatorial cognizance?"

Order *April* 30th. The Lord Chancellor accordingly suspended that part of the order.—The master afterwards made an affidavit, that the college was *merely eleemosynary*; that it had undergone various changes, till at last, Queen *Elizabeth*, in the 15th year of her reign, incorporated it " per nomen magistri et sociorum collegii magnæ
" aulæ universitat. *Oxon*;" that in the said grant there is *no mention* of any *commoners*, or other persons independant of the foundation, and that Mr. *Davison* never was a member of the society, never belonged to the foundation in any sense. The question was, " Whether in a college *Independants* of the foundation
" were of visitatorial jurisdiction?"

On the part of the college it was argued, that the visitor's jurisdiction is confined to the foundation, and is derived solely from the intention of the founder with respect to the distribution of his property. That independant members are pupils received into the college by the Master and Fellows, and submitted to their discretionary government; they are strangers to the foundation. They, therefore, have no other remedy in case of particular grievance, than that which the laws of the land afford them, they have no appeal in the visitor's jurisdiction. The visitor cannot give costs, and young men of fortune may ruin, or at least harass the university by continual vexation.

On the part of the appellant it was insisted, that the visitor's jurisdiction is not confined to the foundation, but comprises the whole government of the college: that the independant members, though strangers to the eleemosynary constitution are not strangers to the college, being recognized, described, and defined in the constitution of the university. For by the university statutes,

tutes, a degree cannot be taken by a perſon not a member of a college. That the ſame ſtatutes enact the duties, privileges, ranks and habits of independent members, according to their ſeveral orders. That theſe deſcriptions and definitions are acknowledged by thoſe laws which affirm the conſtitution of the univerſity. That thoſe laws will imply, on the part of members admitted *intra mœnia ædis*, ſubmiſſion to the orders and ſtatutes of the ſociety, and on the part of the college, protection and redreſs. The relation, therefore, of theſe independent members to the college being legally recognized, definite, and certain, they have an appeal to the viſitor —The Lord Chancellor, with the advice of *De Grey*, Lord Chief Juſtice of the Common Pleas, and Mr. Baron *Adams*, diſmiſſed Mr. *Daviſon*'s petition. And upon examination of the original order, it does not appear that any mention is made of the petitioner having liberty to inſpect the books and charters, &c. of the college, in order to the diſcovery of any *corporate* right he might have.

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Petition diſmiſſed.

Now the order in that caſe is expreſsly founded upon the ground of the appellant being an independent member and a mere ſtranger. Here the proſecutor is an independent member; and if ſo, the authority I have juſt mentioned puts an end to the queſtion: Becauſe, as a *mere boarder*, he had no right to continue in the college after they had given him notice to quit. It may be ſaid there is a diſtinction between that caſe and this, becauſe the ſtatutes of Univerſity College take no notice at all of independent members or ſtrangers; whereas there are expreſs proviſions and regulations in the ſtatutes of Queen's College concerning them. But ſuppoſing Mr. *Crawford* were ſubject to the rules and orders of the college; in that caſe it is inſiſted that the ſentence of expulſion is illegal: And at the trial, the ſtatutes of the college were offered in evidence to ſhew that it ſhould have been ſigned by the maſter and a *majority* of the fellows, whereas it was ſigned by the maſter and *one* fellow only. The anſwer to it is, that even if the allegation were well founded, the merits, the juſtice, or the regularity of the expulſion cannot be entered into at the aſſizes; but the proper mode of impeaching it, is by appeal to the viſitor. Mr. Juſtice *Willes* was of that opinion at the trial: but reſerved the queſtion, Whether the ſtatutes were to be admitted in evidence to impeach the ſentence, and enter into the validity of it there. And we are all of opinion with Mr. Juſtice *Willes*, that they could not. So that even if Mr. *Crawford* was a member, and ſubject to the juriſdiction, rules and orders

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of the college, his mode of redreſs is by appeal to the viſitor, and not to this court.

The king's courts, if the college do not exceed their juriſdiction, have no cognizance, no ſuperintendance. But the viſitor is the only perſon to be applied to, and moreover his judgment is final. He does not proceed by the rules and forms of the common law; but he ſuffers a party *allegare non allegata, et probare non probata*; and decides entirely upon the merits. Therefore this expulſion by the Maſter and reſident Fellows muſt be taken by every body to be a right ſentence till avoided or ſet aſide by the viſitor who is the ſole judge. So with reſpect to ſentences of the eccleſiaſtical court; the temporal courts muſt conſider them as final and concluſive until reverſed.

So in caſes within the juriſdiction of the Admiralty courts, their judgment is concluſive until reverſed.

In this caſe expulſion is a matter entirely of their own juriſdiction. The viſitor might have proceeded upon the contempt and miſbehaviour ſubſequent to the original offence. There is an end of all diſcipline, if this expulſion might be overturned by force and violence without taking the proper courſe of applying to the viſitor. Therefore we are all moſt clearly and ſtrongly of opinion, that Mr. Juſtice *Willes* did extremely right, in refuſing to admit any part of the ſtatutes to be read in evidence at the trial.

It is ſuggeſted to me, that if this were a common law right, like Doctor *Bentley*'s to a degree, it muſt be ſubmitted to until a proper application were made to a court of juſtice in a legal way. It cannot be overturned by force and violence. Therefore let there be,

Judgment for the defendant.

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*Friday, June 23d.*

## ENGLISH qui tam *verſus* COX.

MR. BULLER moved, that the proceedings in this caſe, which was an action on the ſtatute of uſury, might be ſtayed, until the coſts taxed on a *nonpros* in the cauſe wherein *Samuel Chadwick* was plaintiff, and the ſaid *William Cox* defendant (being 20 *l.*); were paid.

ASTON, Juſtice. Though the court may, perhaps, in ſome caſes, have been off their guard, and may have granted a motion of this kind, it has always been refuſed, on conſideration; and the reaſon

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ſon is, that the party is at liberty, if he pleaſes, to purſue the coſts of the former action; and cited a caſe of *Waring* v. *Potter*, which he ſaid was decided about a year and a half ago, in which the court denied a ſimilar motion.

*Per Cur.* Take nothing by the motion.

## REX *verſus* WILLIAM BOWER.

*Friday, June* 23d.

Knowingly *expoſing to ſale*, and *ſelling* wrought gold *under the ſtandard*, *as and for* gold of the true *ſtandard weight*, which is *indictable* in *goldſmiths*, is a *private impoſition* only in a *common perſon*.

THE defendant, who was a *pawnbroker*, was indicted for making, and cauſing to be made, one gold watch chain, weighing fifteen pennyweights and nine grains, of worſe gold than it ought to be made: *to wit*, of gold no way agreeing with the ſtandard, but being according to the rate of twelve carats, and two grains in the pound weight Troy worſe than the ſtandard: and for that, he the ſaid *William Bower*, the ſaid gold chain ſo falſely made, &c. afterwards falſely and *knowingly*, to one *William Black*, did *expoſe to ſale*, and ſell AS AND FOR a thing *wholly made of gold, and agreeing with the* ſaid *ſtandard*, in contempt, &c.

The indictment contained a ſecond count, which was word for word the ſame as the former, except that the former charged the defendant with *making and ſelling*, whereas the latter only charged him with *expoſing to ſale and ſelling* one other gold watch chain, &c. AS AND FOR a thing wholly made of gold agreeing with the ſtandard. The jury found the defendant *not* guilty on the *firſt* count; but *guilty* of the premiſes in the *ſecond* count.

Mr. *Dunning* had obtained a rule to ſhew cauſe why the judgment ſhould not be arreſted upon the ground of this not being an indictable offence, and alſo leave to move for a new trial, if the court ſhould be againſt arreſting the judgment.

Mr. *Wallace* and Mr. *Lucas* now ſhewed cauſe, and inſiſted that the offence as charged in the indictment was a *public* fraud and *cheat* in the courſe of the defendant's trade, and, therefore, indictable at common law, and cited *Tremaine*'s Entries. The *Queen* v. *Macarty et al.* 1 *Salk.* 286. 6 *Mod.* 301. 2 Lord *Raym.* 1179.

Mr. *Dunning contra* contended, that at the utmoſt, this was no more than a mere civil wrong, and, therefore not indictable. That as to its being a cheat, the indictment contained no ſuch charge, nor did it appear upon the evidence given at the trial,

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that the defendant knew whether the chain was of the ſtandard weight or not. For the ſale was by his ſervant; who, upon being aſked by the plaintiff if it was real gold, anſwered in the affirmative that it was.

The queſtion, therefore is, Whether this ignorant miſrepreſentation of the ſervant is ſuch an offence as ſubjects the maſter to an indictment, and he inſiſted it was not.

Afterwards, on *Wedneſday, June* the 25th, Lord *Mansfield* reported the evidence as follows: The proſecutor ſwore that he bought the chain at the defendant's ſhop, of *Thomas Jones* the defendant's ſervant, and aſked him if it was real gold. He ſaid it was: That he carried it to be examined, when he found it to be under the ſtandard weight and not marked: Upon which he returned to the defendant's ſhop, and demanded his money back of the defendant, which the defendant refuſed to give him. I have taken in my note, that the defendant expoſed it to ſale, but have omitted the words, "*knowing, &c.*"—As to that, the knowing it to be under the ſtandard, is an inference of law; but the ſelling by his ſervant was certainly *his* expoſing it to ſale.

His lordſhip then proceeded thus: The queſtion is, Whether the expoſing wrought gold to ſale under the ſtandard, is indictable at common law? There are two precedents in *Tremaine's* Entries; one for making, the other barely for expoſing to ſale. *The ſtatutes upon the ſubject relate only to goldſmiths.*

It is certainly an impoſition; but I incline to think it is one of thoſe frauds only which a man's own common prudence ought to be ſufficient to guard him againſt, and which, therefore, is not indictable; but the party injured is left to his civil remedy.

ASTON Juſtice.—I rather think this is a private cheat. It is not ſelling *by falſe* meaſure, it is only ſelling *under* the ſtandard. Selling coals *under meaſure* is not an indictable offence, but ſelling them by *falſe* meaſure is *; and cited *Rex* v. *Lewis*. *Rex* v. *Wheatly*. *Hil.* 1 *Geo.* 3. *B. R.* Delivering *ſixteen* gallons of beer, as and for *eighteen*, held only a private fraud, and not indictable †, 2 *Burr.* 1125.

* Rex *v.* Driffield, *Hil.* 27 *Geo.* 2.

† Since reported alſo in *Blackſt. Rep.* 273.

WILLES Juſtice.—I am of the ſame opinion. The ſale in this caſe is not a ſale by falſe weight, or by falſe meaſure, but only of a watch chain of inferior value; and it is a favourable caſe; for it was the ſervant who ſold it, and not the maſter, though to be ſure the preſumption is, at the ſame time, that the maſter knew of it. *Rex* v. *Wilder*, *Mich.* 6 *Geo.* 1. *Rex* v. *Wheatley*, *Hil.* 1 *Geo.* 3. *Rex* verſus *Pinkney*, *Paſch.* 6 *Geo.* 2. I

think

think it is within the reaſoning of thoſe caſes a private offence, and therefore not indictable. 1775.

Rule for arreſting the judgment abſolute.

REX *verſus* BOWER.

## REX *verſus* FIELDHOUSE.

*Tueſday, June* 27th.

MR. LUCAS moved, on the part of the proſecutor, to quaſh an indictment againſt the defendant, conſiſting of two counts; one for a *riot*, the other for an *aſſault*, and took this exception: that the grand jury had only found it a *true bill* as to the count for an aſſault, and indorſed *ignoramus* on the count for a riot; whereas they ſhould have found the whole to have been a true bill, or have rejected the indictment *in toto*: and cited 2 *Hawk. P. C.* 210. *Yelv.* 99, 100. *Rex* v. *Ford.* Rule to ſhew cauſe.

Indictment conſiſted of two counts; one for a *riot*, indorſed by the jury "*ignoramus*," the other for an *aſſault*, returned "*billa vera*," and held *good*.

On *Saturday July* 1ſt, Mr. *Buller* ſhewed cauſe, and inſiſted that the doctrine as laid down in 2 *Hawk.* 210. did not apply to the caſe of different counts in the ſame indictment, which was the caſe here; but only to caſes where the jury find *billa vera* and *ignoramus* upon *different parts* of *one* and the ſame charge. Here the charges are two diſtinct charges; the jury find one to be well founded, the other not, which they may well do.

Mr. *Lucas*, contra, contended, that the finding of the jury in this caſe, was clearly bad; for the words of the indorſement do not make the indictment, but only evidence the aſſent or diſſent of the grand inqueſt. The bill itſelf is the indictment, when affirmed. But here, part only of the bill is affirmed; therefore the whole is void: and relied on the caſe of *Rex* v. *Ford*, *Yel.* 99. and 2 *Hawk.* 210, cited above.

ASTON Juſtice. This caſe certainly does not come within the doctrine of *Rex* v. *Ford*, and 2 *Hawk.* 210. That doctrine relates only to caſes where the grand jury take upon themſelves to find part of the ſame indictment to be true, and part falſe. In that caſe it is held that the whole is void; and the reaſon ſeems to be, becauſe the jury do not affirm the fact ſubmitted to their enquiry. But where there are two diſtinct counts, as in this caſe, the finding *billa vera*, as to *one* count only, and rejecting the *other*, leaves the indictment as to the count, which the jury affirm, juſt as if there had originally been only that *one* count. If you can take advantage of it any other way, you are at liberty to do ſo, but I think there is no reaſon to quaſh the indictment.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt concurred.*

*Per. Cur.* Rule diſcharged.

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*Mansfield*, *June* 28th.

## REX *verſus* Inhabitants of RINGWOOD.

On appeal from a poor's rate, becauſe particular perſons or particular property only is omitted in the rate; the ſeſſions ought not to quaſh the whole rate, but ſhould amend it in ſuch particulars.

*Quære*, If perſonal property is rateable?

MR. *Mansfield* laſt term obtained a rule to ſhew cauſe why an order of ſeſſions, quaſhing a rate made for the relief of the poor of the pariſh of *Ringwood*, in the county of *Southampton*, ſhould not be quaſhed, and why the ſaid rate ſhould not be confirmed.

The order of ſeſſions was made upon the appeal of *John Short*, one of the inhabitants. It was ſtated on the ſeſſions's order, that it appeared to them, that *John Newman*, *Stephen Junks*, and *Timothy Swetland* were poſſeſſed as copartners of *ſtock* in the *trade* and buſineſs of *common brewers* and maltſters in the ſaid pariſh of *Ringwood*, to the value of 4000 *l.* For no part of which the ſaid copartners, or either of them, were, or was in the ſaid rate aſſeſſed to the relief of the poor of the ſaid pariſh.—That the ſaid *John Newman*, *Stephen Junks*, and *Timothy Swetland*, were all, at the time of making the ſaid rate, and ſtill are *inhabitants* of the ſaid pariſh of *Ringwood*.—And it doth not appear to this court, that *ſtock in trade* hath *ever before been rated in the ſaid pariſh*.—Therefore, this court is of opinion, and doth adjudge that the ſaid recited rate ought to be quaſhed, and the ſame is hereby quaſhed accordingly. And this court doth hereby order a *new* rate to be made immediately for the relief of the poor of the ſaid pariſh, by the church-wardens and overſeers of the poor of the ſaid pariſh of *Ringwood*.

Mr. *Dunning* and Mr. *Burrough* ſhewed cauſe.—The queſtion is, Whether *perſonal* property is, or is not rateable by the ſtat. 43 *El. c.* 2.? That it is, is manifeſt from the words, "*by taxation* "*of every inhabitant*, *parſon*, *vicar*, and *other*;" for if they were rateable only in reſpect of their *land*, the ſubſequent words "every *occupier of lands*, *houſes*," &c. would be tautology and ſuperfluous. *Dalton's Juſtice*, *edit.* 1715. *c.* 73. *tit. Poor. Reſol.* to the 18th queſtion. This reſolution is recognized in 2 *Bulſtr.* 354. Sir *Anthony Earby*'s caſe, at *Lincoln* aſſizes, 11 *Mar.* 1633. 9 *Car.* 1. "It was ordered and ſettled by the judges of "aſſize, *Hutton*, and *Croke*, that aſſeſſments for the relief of the "poor, ought to be made in an equal manner upon the inhabit-"ants, according to their viſible eſtates, which they had and "enjoyed real and *perſonal*, in the place where they dwelt; and "that it had been ſo *decided by the judges of England*." In Lord

*Raym.*

*Raym.* 1280. *Rex* v. Inhabitants of *Barking*, all four judges agreed and reſolved, that a *tradeſman's* ſtock in trade was rateable to the poor rate, though they differed whether the ſtock of a *farmer* was ſo or not.—In *Rex* v. Guardians of the Poor of *Canterbury*, *Hil.* 9 *Geo. B. R. Rex* v. *Whitney*, *P.* 10 *Geo.* 3. *R. B.* and in a caſe from *Warwickſhire*, in all of which this queſtion came before the court, the court avoided ſaying that perſonal property was not rateable, and gave judgment on other ſufficient grounds which occurred.

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Mr. *Wallace*, Mr. *Mansfield*, and Mr. *Kerby contra.*—The order of ſeſſions ought to be quaſhed, 1ſt, Becauſe the juſtices have done wrong in quaſhing the whole rate, whereas they might and ought to have amended it under *ſtat.* 17 *Geo.* 2. *c.* 3. and ſo it was determined in *Rex* v. Inhabitants of *Whitney*. 2ndly, The order of ſeſſions has rated the *whole* ſtock in trade of the appellants below, who are brewers, without making any *allowance* for their debts; whereas perſonal property, if rateable at all, ought to be rated after all proper deductions; otherwiſe, the debts may exceed the value of the ſtock; and in fact in this caſe, moſt of the articles of the trader's ſtock, as malt and hops have been already taxed where they grew.

As to the authorities, Sir *Anthony Earby's* caſe, 2 *Bulſtr.* 354. is inapplicable to the preſent caſe. The only queſtion there was, whether he was rateable in reſpect of *land out* of the pariſh: there was no queſtion about perſonal property.—The caſe in Lord *Raym.* 1281. related to ſtock upon a farm.

ASTON, Juſtice.—The queſtion was, Whether he was rateable for his hay and corn, which had paid before? It has never been decided that ſtock in trade is not rateable. Sir *Joſeph Yates*, in *Rex* v. Guardians of the Poor of *Canterbury*, did ſay ſomething like it, in the abſence of my Lord Chief Juſtice: but then it was ſaid, that if it was rateable, it muſt be a clear reſidue that is rated after all proper allowances and deductions.

Mr. *Wallace*, &c. As to the word "Inhabitants" in *ſtat.* 43 *El. c.* 2. upon which the argument has chiefly reſted, it was uſed only to diſtinguiſh perſons reſident in, and occupying lands and houſes within the pariſh, from thoſe who occupied lands, *&c.* but did not reſide in the pariſh. This interpretation is warranted by many authorities. In 5 *Co.* 67, *Jefferey's* caſe, the court held he was ratable to the church as an inhabitant of the pariſh in reſpect of lands which he occupied therein, though he reſided elſewhere. 2 *Inſt.* 702. Lord *Coke's* reading upon the *ſtat.* 22 *Hen.* 8.

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*c.* 5. for the repair of bridges. And ſo in reſpect of the burthens impoſed by the ſtatutes of hue and cry, and for the repair of county gaols; all perſons occupying lands or houſes within the hundred or county, are held to be inhabitants, and liable to contribute, though they reſide out of it.

Lord MANSFIELD.—The court are not obliged to give an opinion upon every general queſtion, which the ſeſſions may think fit to bring before it. In general, I believe, neither here nor in any other part of the kingdom, is perſonal property taxed to the poor. But as to this particular caſe, I have no doubt what is to be done with it, as the authority of the *King* and the *Inhabitants* of *Whitney* is preciſely in point. I think the juſtices would not have done very wrong, if they had acquieſced in the practice which has obtained ever ſince the *ſtat.* 43 *Eliz.* of not rating this ſpecies of property. The caſe of the *King* and the Inhabitants of *Whitney*, was determined upon this ſingle ground; that the juſtices in ſeſſions ſhould not have quaſhed the whole rate, (which in caſes where it is not abſolutely neceſſary they are forbid to do by *ſtat.* 17 *Geo.* 2. *c.* 3. *ſect.* 6.) but ſhould have amended it, by inſerting the particular perſons, and that property which was omitted, and which they thought rateable. So here, the juſtices at ſeſſions ſhould have *amended* the rate, if they thought this property rateable; and then on attempting to do it, they would have diſcovered the wiſdom of conforming to the practice, which they expreſsly ſtate in the caſe, of not rating it. If they had tried to have amended it, how would they have rated this ſtock? Are the hops, and the malt, and the boiler to be rated at ſo much for each? Or, is the trader to be rated for the groſs ſum which his whole ſtock would ſell for? If the juſtices had conſidered, they would have found out the ſenſe of not rating it at all; eſpecially when it appears that mankind has, as it were, with one univerſal conſent, reſrained from rating it; the difficulties attending it are too great, and ſo the juſtices would have found them. As to the authorities which have been cited, they are very looſe indeed; and even if they were leſs ſo, one would not pay them much deference, eſpecially as they differ; and the rules they lay down have not been carried into execution for upwards of 100 years. They talk of *viſible* property; what is *viſible* property? I confeſs I do not know what is meant by viſible property. If every viſible thing ſhould be determined to come under that deſcription, in that caſe a leaſe for years, a watch in a man's pocket would be rateable. Viſible property is ſomething local in the place where a

man

1775.

REX *versus* Inhabitants of RINGWOOD.

man inhabits. But that does not decide what a man's perſonal property is. Conſider how many tradeſmen depend upon *oſtenſible* property only.

As to the caſe in Lord *Raym.* 1280, the *only* queſtion ſubmitted to the court was, Whether the ſtock of a *farmer* was rateable to the poor? and they held it was not. But according to the report, they go on and ſay, the *ſtock* of an *artificer* is rateable: They had no caſe before them as to that point, therefore, the judgment upon that queſtion is extrajudicial. But ſuppoſing it were not, what do they mean by the viſible ſtock of an artificer? Some artificers have a conſiderable ſtock in trade; ſome have only a little; others none at all. Shall the tools of a carpenter be called his ſtock in trade, and as ſuch be rated? A taylor has no ſtock in trade, a butcher has none; a ſhoemaker has a great deal. Shall the taylor, whoſe profit is conſiderably greater than that of the ſhoemaker, be untaxed, and the ſhoemaker taxed?—Under the land tax act in *London*, to avoid inconveniences they tax the *houſe* in which a perſon lives at a certain ſum, by gueſs: and to avoid diſcovering a man's ſtock they tax it at random. Inſomuch that I have known a houſe occupied by a phyſician, taxed the ſame as when a merchant had it. But what I ground my opinion on in the preſent caſe is, that it is exactly like the caſe of *Rex* v. The Inhabitants of *Whitney*, where the court quaſhed the order of ſeſſions, becauſe they had quaſhed the whole rate inſtead of amending it: and, therefore, I am clearly of opinion, that the rule for quaſhing the order of ſeſſions ſhould be made abſolute.

ASTON, Juſtice.—There has been no deciſion that perſonal property is rateable: all the opinions upon the ſubject are only *dicta* of judges. Lord *Hale* ſays, the *uſage* has been *againſt* rating perſonal property, and that the inconveniences attending it would be very great. In *Ringwood* it never has been rated. The three caſes that have been relied on are very looſe. But this caſe is juſt like the *Whitney* caſe. There the juſtices quaſhed the whole rate inſtead of amending it. So the juſtices have done here. If they had amended it as they ought to have done, they would in the attempt to make a better rate have found the difficulty of rating perſonal property.

Mr. Juſtice *Willes* and Mr. Juſtice *Aſhhurſt* were of the ſame opinion.

*Per Cur.* Order of Seſſions quaſhed.

1775.

*Monday, July 3d.*

## CATON *verſus* BURTON.

Prohibition denied, where the matter of ſuggeſtion is *debors* the proceedings; unleſs verified by affidavit.

MR. *Buller* had obtained a rule to ſhew cauſe, why a prohibition ſhould not go to the Admiralty Court, in a ſuit for an aſſault upon the high ſeas, upon a ſuggeſtion, that the cauſe of action aroſe, if any where, in the body of a county, *viz.* at *Dover* in the *county of Kent*, and *not* on the *high ſeas;* upon the authority of a caſe in *Moore*, 891. which was a libel in nature of a detinue at common law, for a ſhip lying at anchor at *Limehouſe;* and becauſe *Limehouſe* was *infra corpus comitat.* a prohibition was granted.

Mr. *Mansfield* now ſhewed cauſe and inſiſted, 1ſt. That as the defendant had pleaded to the merits in the *Admiralty* Court, a prohibition ought not to go, becauſe the want of juriſdiction alleged by the ſuggeſtion, did not appear upon the face of the libel; and ſo it was expreſsly held in 2 *Brownl.* 30, *Jennins* v. *Audley.* 2dly. That there ought to have been an affidavit verifying the truth of the ſuggeſtion; whereas, it was only ſworn by a clerk, who had merely copied the proceedings, that he believed the ſuggeſtions were true. 1 *P. Wms.* 476. 2 *Salk.* 549.

Mr. *Wallace* and Mr. *Buller, contra*, contended, that there was no need of an affidavit, verifying the ſuggeſtion in this caſe; becauſe it was not inconſiſtent with the negative plea below to the aſſault; and that the defendant's plea to the merits could make no difference; becauſe a party cannot by his own conſent give a court a juriſdiction which has it not: but even if the defendant had pleaded the matter in the ſuggeſtion, to the juriſdiction of the Court of *Admiralty*, that court could not have been permitted to try it.

ASTON, Juſtice, mentioned the caſe of *Theyer* v. *Eaſtwick*, *Hil.* 7 *Geo.* 3.* which was a prohibition to the *Conſiſtory* Court of *London*, in a ſuit of defamation for calling the plaintiff a whore in *London*, upon a ſuggeſtion, that it was puniſhable at common law by the *cuſtom* of *London*. And the court held an affidavit of the cuſtom was neceſſary. He mentioned alſo the caſes of *Hynes* v. *Thomſon*, *Mich.* 1738, 12 *Geo.* 2. *B. R. Driver et Uxor* v. *Colgate*, *Hil.* 1738, 12 *Geo.* 2. in *B. R.* and *Buggin* v. *Bennet*, *Pach.* 7 *Geo.* 3. *B. R.*† in which latter caſe, he ſaid, the three former were alluded to, and relied on by the court in their judgment.

* 4 *Burr.* 2032.

† 4 *Burr.* 2035.

Lord MANSFIELD.—The reaſon in thoſe caſes is deciſive, namely, that the party ſhall not ſtop the proceedings of a Court of Juſtice, upon a mere ſuggeſtion without an affidavit. 1775.

CATON *verſus* BEATON.

*Per Cur.* Prohibition denied.

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REX *verſus* MARGARET CAROLINE RUDD, widow. *Monday, July 3d.*

UPON a *Habeas Corpus*, directed to the keeper of *Newgate*, he made the following return;

1ſt. A commitment of the defendant by an order made at the *Juſtice Hall*, in the *Old Bailey*, on the firſt of *June* 1775; for that it appears to them, upon the teſtimony of *Robert Drummond* and *Henry Drummond*, Eſqrs. who were examined as witneſſes on the trial of *Robert Perreau*, on an indictment for felony and forgery; "That ſhe did feloniouſly and falſely, make, "forge, and counterfeit a certain paper writing, purporting to "be the bond of *William Adair*, Eſq. for the payment of the "ſum of 7500 *l.* with intention to defraud the ſaid *William* "*Adair*, againſt the form of the ſtatute in ſuch caſe made and "provided:" Wherefore they order her to be committed to the cuſtody of the keeper of *Newgate*, to anſwer all ſuch matters and things, as on his Majeſty's behalf ſhall be objected againſt her, touching the ſaid felony and forgery; there to remain in ſafe cuſtody until ſhe ſhall be diſcharged by due courſe of law.

2*dly*. A detainer by virtue of another order made at a further adjournment of the ſame ſeſſion of gaol delivery of *Newgate*, on the 7th of *June* 1775; ſhe being then at the bar of the ſaid Court, and charged upon the oath of Sir *Thomas Frankland*, Baronet, with having feloniouſly and falſely, made, forged, and counterfeited two certain paper writings, purporting to be the bonds of *William Adair*, Eſq. one for the payment of the ſum of 6000 *l.* and the other for the payment of the ſum of 5300 *l.* with intention to defraud the ſaid Sir *Thomas Frankland*, Baronet, againſt the form of the ſtatute, in ſuch caſes made and provided; to remain in *Newgate* until the next delivery of the King's gaol in *Newgate*, to be holden for the ſaid county of *Middleſex*, to anſwer all ſuch matters and things as ſhall be objected againſt her on his Majeſty's behalf, touching the ſaid felonies and forgeries; and until ſhe ſhall be diſcharged by due courſe of law.

Upon this return being read, Mr. *Davenport* moved to bail the defendant, relying chiefly on the circumſtance of her having been

An accomplice, who in a caſe out of the ſtatutes, is under the *practice* allowed, admitted by the juſtices of peace, as a witneſs, and is afterwards proſecuted; has only a claim to the mercy of the crown, founded on an expreſs or implied promiſe of the magiſtrate, on a condition performed: and it depends on his conduct in *fully* and fairly diſcloſing the joint guilt of himſelf and his companions whether the court will admit him to bail, that he may apply for a pardon.

1775. been admitted, and even examined as a king's evidence againſt the *Perreaus*.

REX verſus RUDD. Mr. *Wallace*, on the part of the proſecutor oppoſed it: When the Court adjourned the conſideration of it till the next morning.

The next day the return was read again; the keeper of *Newgate* having received a freſh warrant of detainer againſt her, *viz.* A detainer in his cuſtody, by virtue of a warrant under the hand and ſeal of *Sampſon Wright*, Eſq. a juſtice of peace for *Middleſex*, ſhe being charged before him, upon the oath of *Henrietta Alice Perreau*, for feloniouſly uttering and publiſhing as true, well knowing the ſame to be falſe, forged, and counterfeited, a certain bond for the payment of 5300 *l.* payable to *Robert Perreau*, ſigned *William Adair*, witneſſes, *Arthur Jones* and *Thomas Sturt*, with intention to defraud the ſaid *William Adair*, againſt the ſtatute, *&c.* and her ſafely to keep in his ſaid cuſtody until ſhe ſhould be diſcharged by due courſe of law. Dated the 3d of *July* 1775.

On the part of the defendant, an affidavit from three juſtices (Sir *John Fielding*, *Sampſon Wright*, and *William Addington*, Eſqrs.) was produced, in which it was ſworn, that they admitted her as a *general* witneſs for the crown, as to *all* the forgeries: That upon her own confeſſion ſhe acknowledged herſelf a *particeps criminis* in the forgery of the bond of 7500 *l.* but denied having any knowledge of or concern in any of the other bonds.

Mr. *Wallace*, Mr. *Lucas*, and Mr. *Howorth*, who ſhewed cauſe againſt admitting her to bail, objected, that the juſtices had no power to admit an accomplice in *forgery* as a witneſs, under the ſtat. 10 and 11 *Wil.* III. *c.* 23. or 5 *Ann. c.* 31. forgery not being one of the offences enumerated in thoſe ſtatutes. 2*dly*, Suppoſing forgery were an offence within thoſe ſtatutes, the confeſſion of the defendant went no further than the bond for 7500 *l.* and was ſilent as to the other two: Therefore, not having complied with the condition which the ſtatute impoſes, of making a full diſcloſure and diſcovery of all ſhe knew, ſhe was not entitled to any favour or protection in reſpect of the other two bonds.

Mr. *Davenport contra* for the defendant. Whether the juſtices have or have not ſtrictly purſued the proviſions of the different acts of parliament in this caſe, is not ſo much the queſtion upon the application now before the court, as whether the defendant

defendant has or has not, under the faith and confidence she repoſed in them, taking it for granted they were perfectly acquainted with the duty of their office, made ſuch a diſcloſure and diſcovery of every thing ſhe knows relative to the crimes with which ſhe is charged, as led them to admit her a King's evidence, and taught her to believe ſhe would be entitled to the privilege and protection which the law holds forth to all perſons in her ſituation. Moſt undoubtedly ſhe would have been totally ſilent upon the ſubject, if the hope and expectation, and even promiſe of a pardon had not been held out as an inducement to her to make the confeſſion ſhe has made. Therefore, to deprive her of the means of obtaining that pardon, is to have deceived, and drawn her in, under the colour and pretence of a judicial authority and power of protection, to diſcloſe what ſhe was not bound to diſcover, and to make her the deluded inſtrument of her own conviction. However irregular, therefore, the proceedings of the juſtices may have been, the court will not countenance the objections made to the preſent application, which are founded in nothing leſs than a breach of public faith. He alſo urged the circumſtances of the defendant's health, being ſuch as might, in all probability, be endangered by the confinement, if ſhe was to be remanded. 1778. Rex verſus Rudd.

Lord MANSFIELD.—It appears by the return to this writ, that the priſoner is detained in cuſtody, by two orders of the court of ſeſſions and gaol delivery at the *Old Bailey*, for the forgery of two ſeveral bonds. It appears alſo, that ſhe is further detained by a warrant from a juſtice of peace for uttering one of theſe bonds knowing it to be forged: Therefore, though this court has undoubtedly a diſcretionary power to bail in *all* caſes *whatſoever*, yet as the ſeſſions are ſo near, and the offence committed by the priſoner of ſuch a magnitude as that of repeated forgery, there is no colour for the preſent application upon the ground of that general diſcretion. As to the next allegation, that her ſtate of health is ſuch as to be endangered by the confinement, it is not of *itſelf* a ſufficient circumſtance, in ſuch a caſe, to induce the court to interpoſe in her behalf.

A third ground which has been urged in ſupport of the preſent application is this: That the priſoner has been drawn in by promiſes and aſſurances, to anſwer to an examination, and to ſwear to it on oath, which ſhe would not have done, but from a confidence, that thoſe promiſes and aſſurances would have been kept and performed.

The

1775.

Rex verſus Russ.

The inſtance has frequently happened, of perſons having made confeſſions under threats or promiſes: The conſequence as frequently has been, that ſuch examinations and confeſſions have not been made uſe of againſt them on their trial. But it has been urged, that the priſoner in this caſe, is an *accomplice* who has been *admitted* to give *evidence*; that ſhe has already given evidence, and is further ready to give evidence to convict her partners in the buſineſs; and therefore, that ſhe is entitled by law to the King's pardon, and to a pardon which would operate in bar of her own crime. If ſhe had ſuch a right, we ſhould be bound *ex debito juſtitiæ* to bail her. If ſhe had not ſuch legal right, but yet came under circumſtances ſufficient to warrant the court in ſaying, that ſhe had a title of recommendation to the king for a pardon, we ſhould bail her for the purpoſe of giving her an opportunity of applying for ſuch pardon.

There are *three* ways in law and practice, which give accomplices a right to a pardon; and there is *one* mode, which entitles them to a *recommendation* to the king's mercy.

The three legal ways are *firſt*, in the caſe of *approvement*, which ſtill remains a part of the common law, though, by long diſcontinuance, the practice of admitting perſons to be approvers is now grown into diſuſe. *Secondly*, the caſe of perſons who come within the ſtatutes 10 and 11 of *Will.* 3. *c.* 23. *ſect.* 5. and 5 *Ann. c.* 31. *ſect.* 4. And *thirdly*, the caſe of perſons to whom the king has, by ſpecial proclamation in the Gazette or otherwiſe, promiſed his pardon.

Approvers have a right to a pardon, perſons within the ſtatutes of *William* and *Anne*, have a right to a pardon, and the other claſs of offenders who come in under the royal faith and promiſe, have a right to a pardon; and in all theſe caſes the court will bail them, in order to give them an opportunity of applying for a pardon.

There is beſides a *practice*, which indeed does not give a legal right; and that is, where accomplices having made a full and fair confeſſion of the whole truth, are in conſequence thereof admitted evidence for the crown, and that evidence is afterwards made uſe of to convict the other offenders. If in that caſe they act fairly and openly, and diſcover the whole truth, though they are not entitled *of right* to a pardon, yet the *uſage*, the lenity, and the practice of the court is, to ſtop the proſecution againſt them, and they have an equitable title to a recommendation for the king's mercy.

The

1775.

REX *versus* REDE.

. The ſtatutes of *William* and *Anne* are to be laid out of this caſe, 1ſt, becauſe they are confined to the diſcovery of particular offences only, of which forgery is not one; ſecondly, becauſe they relate only to perſons who are at large; beſides which, to entitle themſelves to a pardon, they muſt actually *convict* two offenders at leaſt. For if their confeſſion be ſuch on their trial, as the jury gives no credit to, they are liable to proſecution. Theſe ſtatutes are therefore quite foreign to the preſent caſe, as are likewiſe all promiſes of pardon from the crown by proclamation.

There remains, therefore, only the equitable practice which gives a title to recommendation to the mercy of the crown.

The law of approvement (in analogy to which this other practice has been adopted, and ſo modelled as to be received with more latitude,) is ſtill in force, and is very material.

A perſon deſiring to be an approver, muſt be one *indicted* of the offence, and *in cuſtody* on that indictment: He muſt confeſs himſelf guilty of the offence, and *deſire* to accuſe his accomplices: He muſt likewiſe upon oath diſcover, not only the particular offence for which he is indicted; but *all treaſons* and *felonies* which he *knows of*; and after all this, it is in the diſcretion of the court, whether they will aſſign him a coroner, and admit him to be an approver or not: For if, on his confeſſion it appears, that he is a *principal*, and tempted the others, the court may refuſe and reject him as an approver. When he is admitted as ſuch, it muſt appear that what he has diſcovered is true; and that he has diſcovered the *whole truth*. For this purpoſe, the coroner puts his appeal into form; and when the priſoner returns into court, he muſt repeat his appeal, without any help from the court, or from any by-ſtander. And the law is ſo nice, that if he *vary* in a *ſingle circumſtance*, the whole falls to the ground, and he is condemned to be hanged; if he *fail* in the colour of a *horſe*, or in circumſtances of time, ſo rigorous is the law, that he is condemned to be hanged; much more, if he fail in eſſentials. The ſame conſequences follow if he does not diſcover the *whole truth*: And in all theſe caſes the approver is convicted on his own confeſſion. See this doctrine more at large in *Hale's Pleas Crown, vol.* 2. *page* 226 *to* 236. *Staunf. Pl. Crown, lib.* 2. *c.* 52. *to c.* 58. 3 *Inſt.* 129.—A further rigorous circumſtance is, that it is neceſſary to the approver's own ſafety, that the jury ſhould believe him; for if the partners in his crime are not convicted, the approver himſelf is executed.

Great

1775.

REX
verſus
RUDD.

Great inconvenience aroſe out of this practice of approvement. —No doubt, if it was not abſolutely neceſſary for the execution of the law againſt notorious offenders, that accomplices ſhould be received as witneſſes, the practice is liable to many objections. And though, under this practice, they are clearly competent witneſſes, their ſingle teſtimony alone is ſeldom of ſufficient weight with a jury to convict the offenders; it being ſo ſtrong a temptation to a man to commit perjury, if by accuſing another he can eſcape himſelf.

Let us ſee what has come in the room of this practice of approvement. A kind of *hope*; that accomplices, who behave fairly and diſcloſe the whole truth, and bring others to juſtice, ſhould themſelves eſcape puniſhment, and be pardoned. This is in the nature of a recommendation to mercy. But no authority is given to a juſtice of the peace to pardon an offender, and to tell him he ſhall be a witneſs againſt others. The accomplice is not aſſured of his pardon; but gives his evidence in *vinculis*, in cuſtody: And it depends on the title he has from his behaviour, whether he ſhall be pardoned or executed. A juſtice has no authority to ſelect whom he pleaſes to pardon or proſecute, and the proſecutor himſelf has even a leſs power or rather pretence to ſelect than the juſtice of peace.

It reſts therefore on *uſage*, and on the offender's own good behaviour, whether he ſhall be proſecuted or not. And if, in a proper caſe, an application was to be made to this court, by an accomplice to be bailed; that is, in the caſe of a perſon properly within the uſage, and who has fully complied with the requiſite conditions, I ſhould have no difficulty in bailing him, in order that he might apply for the King's pardon.

I am apprized of the caſe of an accomplice upon a trial before Mr. *Juſtice Gould*, the circumſtances of which were as follows: An accomplice made a fair and full diſcovery to the ſatisfaction of Mr. *Juſtice Gould*, who tried the other offenders. The other witneſſes who were called upon the trial proved the identity of the accomplice by the deſcription of his perſon, but failed as to the identity of the other offenders: And the jury, becauſe they doubted of the guilt of the others, acquitted them. The counſel on the part of the proſecution then contended that the accomplice ought to be tried: but Mr. *Juſtice Gould*, under the circumſtances of the caſe, was of a contrary opinion, and I think very rightly.

Theſe being the general rules, let us ſee how far the preſent caſe is applicable to them, or in any degree falls within the rea-

ſon of them. A bond is detected to have been forged: three perſons are apprehended on ſuſpicion; the two *Perreaus* and the priſoner. The juſtices by their affidavit ſay, they admitted the priſoner as an evidence againſt the *Perreaus*, and ſwear they conſidered her as an accomplice: and they ſay they told her, "that if ſhe would ſpeak the truth, and the *whole truth*, not "only in reſpect of the bond in queſtion, but of *all the other* "*forgeries*, that then ſhe ſhould be *ſafe*; if not ſhe would be "proſecuted:" and the truth is, that, in point of law, ſhe was liable to be proſecuted for all. 1775. The King verſus Rudd

What is the diſcloſure ſhe makes? It is this: "That *Daniel* "*Perreau* came with a knife to her throat, and threatened to kill "her if ſhe did not forge *one* of the bonds in queſtion: that "under the terror of death ſhe forged it; and that *Robert Perreau* "brought the bond before ready filled up." On this information ſhe is no accomplice; ſhe has confeſſed no guilt, if the fact is true that ſhe was under the fear of immediate death; for it is the will that conſtitutes a crime. She comes, therefore, in the character of a perſon injured, in the character of one to whom this violence has been done. Inſtead of being a party offending, ſhe is a party *offended* as much as a man who has been robbed on the highway.—Farther, the juſtices do no treat her as an accomplice; for they ought to have kept her in cuſtody if ſhe had been an accomplice; but they diſcharged her, and they did right, there being no charge againſt her. But ſtill they ſay in their affidavit, they did conſider her as an accomplice. Suppoſe they did really think her guilty, ſhe is not the more or leſs on that account an accomplice. But what is moſt material is, that her information is flatly contradicted by herſelf; for on a voluntary confeſſion of her own, ſhe took the whole guilt upon herſelf, ſaid that ſhe alone forged the bond for 7,500*l.* and that *Robert Perreau* was an innocent man. If the juſtices had known of this confeſſion, they could not have admitted her as an evidence: becauſe by that confeſſion ſhe makes herſelf not only a *principal*, but the *only* perſon guilty.

One of the bonds for which ſhe is now detained, is dated three months prior to the bond in which *Robert Perreau* was concerned. Of this bond ſhe is totally ſilent, and denies any knowledge of the other two. Her information is therefore falſe, and the conditions offered to her by the juſtices not complied with.—I agree with Mr. *Davenport*, that if ſhe had made a fair and full diſcloſure of all that ſhe knew, and the juſtices had deceived her,

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verſus
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under a promiſe or aſſurance or hope of pardon from them, ſhe would be entitled to a recommendation to mercy: and in that caſe I ſhould have been of opinion to bail her, though the juſtices had in ſtrictneſs no right to make ſuch a promiſe, or give her ſuch aſſurance. If any evidence or confeſſion has been extorted from her, it will be of no prejudice to her on the trial.

The three other judges concurred.

*Per cur.* let her be remanded.

Afterwards, at the gaol delivery held at the Old Bailey, in *September* 1775, before *Gould* and *Aſhhurſt* juſtices, and *Hotham* Baron; upon the defendant being brought to the bar to plead to ſeveral indictments for forgery found againſt her, the ſame objections were made as to the propriety of putting her upon her trial; and the judges differing in opinion, it was poſtponed, that the opinion of all the judges might be taken. Accordingly the enſuing gaol delivery on *Wedneſday* the 6th of *December* 1775, held before *Aſton* Juſtice, and *Burland* Baron; *Aſton* Juſtice, upon the defendant being brought to the bar, delivered the opinion of the judges as follows:

*Margaret Caroline Rudd*, at the laſt *September* ſeſſion, upon your being brought to the bar, to plead to ſeveral indictments found againſt you for forgery, it was inſiſted upon by your counſel, that, in point of law, you ought not to be put upon your trial at all; as you had confeſſed yourſelf to be an accomplice before the juſtices of the peace for the county of *Middleſex*, and had been by them admitted as an evidence for the crown againſt your companions in guilt, *Robert* and *Daniel Perreau*. The ground of that claim was founded upon the ſuppoſed merit of the diſcovery you had made: that being admitted to give evidence as an accomplice, and having performed your engagement to the public, by being examined before the grand jury, and being ready to have given evidence upon the trial, if called upon, you was entitled to a pardon, or not to have been proſecuted, that you might have time to apply elſewhere: that the conſtant practice in regard to accomplices becoming the King's evidence, was, that they ſhould not be proſecuted for the offence they had confeſſed, or ſuch like offences: that a contrary conduct would be a breach of faith with *you*, and would diſcourage the future diſcovery of criminals, if after ſuch diſcloſure they were nevertheleſs to undergo proſecutions for their offences. To this it was anſwered, that the diſcovery meant by law or practice to entitle an accomplice to favour, muſt be a full, ample and true diſcovery; and that it would never

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never diſcourage the making ſuch diſcoveries, if criminals offering themſelves as witneſſes, were made to underſtand, that to entitle themſelves to mercy or favour, they are to make a full diſcovery of all the offences about which they were queſtioned, and of all their accomplices in guilt. And it was farther inſiſted, that you had not made a *fair* diſcloſure, at the time of your examination, of *all* you knew relative to the forgeries which had been committed and publiſhed; but that you ſtood charged by the grand jury with ſeveral *other* forgeries which you had *denied the knowledge of*. Upon the debate of this matter before the bench of gaol delivery, the judges preſent not all concurring in one opinion, and it being judged a point of great weight and importance in the criminal law, fit to be fully conſidered and finally ſettled, how far, under what circumſtances, and in what manner, an accomplice received as a witneſs, ought to be entitled to favour and mercy; the farther conſideration of the matter was then deferred, in order that the opinion of all the judges might be taken upon the point of law.

*Eleven* of the judges have accordingly met, the Lord Chief Juſtice of the *Common Pleas* being abſent through indiſpoſition; and have mutually and deliberately conſidered of the matter, under all the circumſtances, and it falls to my ſhare to deliver in your preſence, to the public, the ſubſtance of their reaſons upon the occaſion, that the ground of their reſolves may be rightly underſtood. *All* the judges were of opinion, that in caſes not within any ſtatute, an accomplice, who fully and truly diſcloſes the joint guilt of himſelf and of his companions, and truly anſwers all queſtions that are put to him, and is admitted by juſtices of the peace as a witneſs againſt his companions, and who, when called upon, does give evidence accordingly, and appears under all the circumſtances of the caſe to have acted a fair and ingenuous part, and to have made a full and true information, ought not to be proſecuted for his own guilt ſo diſcloſed by him, nor, perhaps, for any other offence of the ſame kind, which he may accidentally, and without any bad deſign, have omitted in his confeſſion. But he cannot by law plead this in bar to any indictment againſt him, nor avail himſelf of it upon his trial; for it is merely an equitable claim to the mercy of the crown, from the magiſtrates expreſs or implied promiſe of an indemnity, upon certain conditions that have been performed: it can only come before the court by way of application to put off the trial, in order to give the priſoner time to apply to the court for a pardon.

In caſes out of the ſtatutes, an accomplice *fully* and *fairly diſcloſing* the joint guilt of himſelf and his companions and who is admitted a witneſs and does give evidence, ought not to be proſecuted for his own guilt ſo diſcloſed; nor *perhaps*, for any other offence *accidentally* omitted by him.

But if proſecuted, he cannot plead this in bar, nor avail himſelf of it upon his trial. But he may apply to the court to put off the trial, that he may have time to apply for a pardon.

1775.

REX versus RUDD.

apply elſewhere.—*Nine* of the eleven judges were of opinion, that *all the circumſtances* relative to a priſoner's claim of indemnity, in ſuch a caſe, not only may, but *ought* to be laid before the court, to enable them to exerciſe their diſcretion, whether, upon the grounds before them, the trial ſhould be put off, and conſequently have intimation given that the priſoner ought not to be proſecuted. For the *diſcretionary* power exerciſed by the *juſtices* of peace in admitting accomplices to be witneſſes, founded in *practice only*, cannot controul the authority of the court of *gaol delivery*, and exempt at all events the accomplice from being proſecuted. Upon every motion made, upon collateral equitable grounds, the court will ſee and examine into the *whole truth*, and conſequently ought to be informed of all the circumſtances affecting the caſe.

The affidavit of the juſtices, therefore, muſt in this caſe be neceſſarily taken into conſideration, to ſee upon what ground they admitted the priſoner as a witneſs. For if the court looked no further than the priſoner's own information in the preſent caſe, they could not have learnt from thence that ſhe had ever been conſidered as an accomplice at all; and as ſuch had been admitted as a witneſs againſt the *Perreaus* in either of the proſecutions. Upon their affidavit it appears that the public faith was not engaged but *conditionally*; and that there was an expreſs admonition given to the priſoner, not to conceal *any part* of the truth.

The ſame *nine* judges alſo were of opinion, that if the matter ſtood ſingly upon the two informations of the priſoner compared with the indictments againſt her, that ſhe ought to have been tried upon *all* or *any of* them: for from the priſoner's information ſhe is *no accomplice*; ſhe has not confeſſed herſelf guilty of any offence at all. By her repreſentation the ſhare ſhe has had in theſe tranſactions is perfectly innocent; but ſhe exhibits a charge againſt *Robert* and *Daniel Perreau*, the one ſoliciting her to imitate the hand of *William Adair* from a paper he produces; the other forcing her to do the act of forgery, under the threat and fear of death. Her two informations are contradictory; and every indictment that is preferred againſt her, proceeds upon a falſification of the account ſhe has given; for ſhe anſwers to the juſtices' interrogation, that *ſhe does not know of any other forgeries:* ſo ſhe does not confeſs, make any diſcovery, or become a witneſs concerning theſe offences; and if ſhe has ſuppreſſed the truth, and not made a full and fair diſcloſure, ſhe forfeits all equitable claim to favour and mercy. But if ſhe has

has *told the truth, and the whole truth*, ſhe cannot be convicted. On the other hand, taking the affidavit of the juſtices, and all the caſe into conſideration, if ſhe is guilty of the charge contained in the indictments preferred by Sir *Thomas Frankland*, the judges are of opinion, as her informations before the juſtices have no relation to theſe charges, they can in no light be applied to mitigate her offences. 1775 Rex verſus Rudd.

Upon the whole, whether the priſoner is guilty or not guilty, is a fact ſtill to be tried by a jury upon legal evidence only, without prejudice to the priſoner from any thing which has been inſiſted upon in point of law by her counſel to exempt her from any trial at all. For it would be hard indeed upon the ſubject, who has a right to advice and aſſiſtance of counſel in all matters and points of law that may ariſe upon his caſe, if the eventual deciſion of the court againſt the points of law inſiſted upon in his behalf, ſhould prejudice the ſubſequent trial of the facts, which is ultimately to be governed by the rules of evidence, and to be decided by the verdict of the jury. I hope and truſt the facts will be tried without the leaſt attention to, or even a remembrance of, any one matter or thing whatever, which has either made its appearance in print, or been the ſubject of common converſation.—I ſhall only add, that an accomplice, who deſires his trial may be put off, that he may apply for mercy under all the moſt regular pretenſions before laid down, *confeſſes the guilt*. But under the circumſtances of this caſe, if the priſoner confeſſes the offences charged in theſe indictments, ſhe has no *promiſe* of *mercy*, and no *claim* to favour for the reaſons aforeſaid.

The judges, therefore, are of opinion, that the trial ought to proceed; and I have authority to ſay, that the Lord Chief Juſtice of the *Common Pleas* concurs in that opinion.

*N. B.* The jury brought in their verdict as follows: "not "guilty, according to the evidence before us."

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HOLMAN *et al*^*r*^. *verſus* JOHNSON, *alias* NEWLAND. *Wedneſday, July 5th.*

*ASSUMPSIT* for goods ſold and delivered: Plea *non aſſumpſit* and verdict for the plaintiff. Upon a rule to ſhew cauſe why a new trial ſhould not be granted, Lord *Mansfield* reported the caſe, which was ſhortly this: The plaintiff who was reſident at, and an inhabitant of, *Dunkirk*, together with his partner, Action lies for goods ſold *abroad*, which are *prohibited here*, if the *delivery* of them be *completed abroad*; tho' the vendor knows they are to be run into *England*.

1775. partner, a native of that place, sold and delivered a quantity of tea, for the price of which the action was brought, to the order of the defendant, knowing it was intended to be smuggled by him into *England*: they had, however, no concern in the smuggling scheme itself, but merely sold this tea to him, as they would have done to any other person in the common and ordinary course of their trade.

HOLMAN *against* JOHNSON.

Mr. *Mansfield*, in support of the rule, insisted, that the contract for the sale of this tea being founded upon an intention to make an illicit use of it, which intention and purpose was with the privity and knowledge of the plaintiff, he was not entitled to the assistance of the laws of this country to recover the value of it. He cited *Huberus* 2 *vol.* 538, 539, and *Robinson* v. *Bland**, to shew that the contract must be judged of by the laws of this country, and consequently that an action for the price of the tea could not be supported here.

* 2 *Bur.* 1077, since also reported in 1 *Black. Rep.* 234. 256.

Mr. *Dunning*, Mr. *Davenport*, and Mr. *Buller*, *contra*, for the plaintiff, contended, that the contract being complete by the delivery of the goods at *Dunkirk*, where the plaintiff might lawfully sell, and the defendant lawfully buy, it could neither directly nor indirectly be said to be done in violation of the laws of this country; consequently it was a good and valid contract, and the plaintiff entitled to recover. It was of no moment or concern to the plaintiff what the defendant meant to do with the tea, nor had he any interest in the event. If he had, or if the contract had been that the plaintiff should deliver the tea in *England*, it would have been a different question; but there was no such undertaking on his part. They pressed the argument *ab inconvenienti*, and cited several cases. MSS. *at N. Pri.* before Lord *Mansfield*, sittings in *London*.—An action brought by the plaintiffs, who were lace-merchants in *Paris*, for laces (which were contraband in this country) sold and delivered to the defendant's order at *Calais*. The question made was, Whether the vendor of contraband goods at *Paris* was not bound to run the risk of their being smuggled into this country? But Lord *Mansfield* held, that as the contract on the part of the plaintiff was complete by his delivering the laces at *Calais*, he was clearly entitled to recover, and the jury found a verdict accordingly.—*Faikney* v. *Reynous* and *Richardson*, *East.* 7 *Geo.* 3. *B. R.* since reported in 4 *Bur.* 2,069. & 1 *Black.* 633. where one partner in a stock-jobbing contract lent the other 1,500*l.* to pay his moiety of the differences on the *rescounter* day; and though this was pleaded

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to the bond, the court upon demurrer over-ruled the plea, and held the plaintiff was entitled to recover. *Bruſton* v. *Clifford.* in *Chan.* before Lord *Camden*, 4th *December*, 1767. *Aſhbrook* v. *Hall* in *C. B.* where money paid for the defendant for a gaming debt was held recoverable by the plaintiff. 1775. HOLMAN *versus* JOHNSON.

Lord MANSFIELD.—There can be no doubt, but that every action tried here muſt be tried by the law of *England*; but the law of *England* ſays, that in a variety of circumſtances, with regard to contracts legally made abroad, the laws of the country where the cauſe of action aroſe ſhall govern.—There are a great many caſes which every country ſays ſhall be determined by the laws of foreign countries where they ariſe. But I do not ſee how the principles on which that doctrine obtains are applicable to the preſent caſe. For no country ever takes notice of the *revenue* laws of another.

The objection, that a contract is immoral or illegal as between plaintiff and defendant, ſounds at all times very ill in the mouth of the defendant. It is not for his ſake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real juſtice, as between him and the plaintiff, by accident, if I may ſo ſay. The principle of public policy is this; *ex dolo malo non oritur actio.* No court will lend its aid to a man who founds his cauſe of action upon an immoral or an illegal act. If, from the plaintiff's own ſtating or otherwiſe, the cauſe of action appears to ariſe *ex turpi cauſâ*, or the tranſgreſſion of a poſitive law of this country, there the court ſays he has no right to be aſſiſted. It is upon that ground the court goes; not for the ſake of the defendant, but becauſe they will not lend their aid to ſuch a plaintiff. So if the plaintiff and defendant were to change ſides, and the defendant was to bring his action againſt the plaintiff, the latter would then have the advantage of it; for where both are *equally* in fault, *potior eſt conditio defendentis.*

The queſtion therefore is, Whether, in this caſe, the plaintiff's demand is founded upon the ground of any *immoral* act or contract, or upon the ground of his being guilty of any thing which is prohibited by a poſitive law of this country.—An immoral contract it certainly is not; for the revenue laws themſelves, as well as the offences againſt them, are all *poſitivi juris.* What then is the contract of the plaintiff? It is this: being a reſident and inhabitant of *Dunkirk*, together with his partner, who was born there, he ſells a quantity of tea to the defendant, and delivers it at *Dun-*

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HOLMAN *verſus* JOHNSON.

*kirk* to the defendant's order, to be paid for in ready money there, or by bills drawn perſonally upon him in *England*. This is an action brought merely for goods ſold and delivered at *Dunkirk*. Where then, or in what reſpect is the plaintiff guilty of any crime? Is there any law of *England* tranſgreſſed by a perſon making a complete ſale of a parcel of goods at *Dunkirk*, and giving credit for them? The contract is complete, and nothing is left to be done. The ſeller, indeed, knows what the buyer is going to do with the goods, but has no concern in the tranſaction itſelf. It is not a bargain to be paid in caſe the vendee ſhould ſucceed in landing the goods; but the intereſt of the vendor is totally at an end, and his contract *complete* by the *delivery* of the goods at *Dunkirk*.

To what a dangerous extent would this go if it were to be held a crime. If contraband clothes are bought in *France*, and brought home hither; or if glaſs bought abroad, which ought to pay a great duty, is run into *England*; ſhall the *French* taylor or the glaſs-manufacturer ſtand to the riſk or loſs attending their being run into *England*? Clearly not. Debt follows the perſon, and may be recovered in *England*, let the contract of debt be made where it will; and the law allows a fiction for the ſake of expediting the remedy. Therefore, I am clearly of opinion, that the vendors of theſe goods are not guilty of any offence, nor have they tranſgreſſed againſt the proviſions of any act of parliament.

I am very glad the old books have been looked into. The doctrine *Huberus* lays down, is founded in good ſenſe, and upon general principles of juſtice. I entirely agree with him. He puts the general caſe in queſtion, thus: *Tit. de conflictu legum, vol. 2. pag.* 539. "In certo loco merces quædam prohibitæ ſunt. "Si vendantur *ibi*, contractus eſt *nullus*. Verum, ſi merx eadem "*alibi* ſit vendita, ubi *non* erat *interdicta*, emptor condemnabitur, "quia, contractus inde *ab initio validus* fuit." Tranſlated, it might be rendered thus: In *England*, tea, which has not paid duty, is prohibited; and if ſold there the contract is *null* and void. But if ſold and *delivered* at a place where it is not prohibited, as at *Dunkirk*, and an action is brought for the price of it in *England*, the buyer ſhall be condemned to pay the price; becauſe the original contract was good and valid.—He goes on thus: "Verum ſi merces venditæ in *altero loco*, ubi prohibitæ "ſunt eſſent *tradendæ*, jam *non* fieret *condemnatio*, quia repugna-"ret hoc juri et commodo reipublicæ quæ merces prohibuit." Apply this in the ſame manner.—But if the goods ſold were to be *delivered* in *England*, where they are prohibited; the contract

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is void, and the buyer ſhall not be liable in an action for the price, becauſe it would be an inconvenience and prejudice to the ſtate if ſuch an action could be maintained. 1775. HOLMAN verſus JOHNSON.

The *gift* of the whole turns upon this; that the concluſive delivery was at *Dunkirk*. If the defendant had beſpoke the tea at *Dunkirk* to be ſent to *England* at a certain price; and the plaintiff had undertaken to ſend it into *England*, or had had any concern in the running it into *England*, he would have been an offender againſt the laws of this country. But upon the facts of the caſe, from the firſt to the laſt, he clearly has offended againſt no law of *England*. Therefore, let the rule for a new trial be diſcharged.

The three other judges concurred.

THE END OF TRINITY TERM.

# MICHAELMAS TERM

## 16 GEORGE III. B. R. 1775.

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*Friday, Nov.* 10th.

### MASSEY *verſus* RICE *et al'*.

What is a ſufficient deſcription in a common recovery.

THIS was a writ of error from a judgment on *ſcire facias* in the court of King's Bench in *Ireland*, brought to reverſe four common recoveries in the Court of Common Pleas there; *viz.* two of lands in the *county* of *Limerick*, and two of lands in the *city* of *Limerick*; but the Court of King's Bench in *Ireland* affirmed them all.

This caſe was argued twice; firſt, in the laſt term, by Mr. *Buller* for the plaintiff, and Mr. *Alleyne* for the defendant; and again in this term, by Mr. *Wallace* for the plaintiff, and Serjeant *Walker* for the defendant.

Mr. *Buller* for the plaintiff in error objected, that the ſeveral deſcriptions in all the four recoveries were bad. There were fourteen parcels in each recovery, and the principal objections he made were as follow: 1ſt, As to the premiſes in the *county*, becauſe ſome were demanded thus; "all thoſe the *caſtle*, *town*, and *lands* "of, *&c.* containing by *eſtimation* ſo many acres," without ſetting out the *quality* of the *lands*, as meadow, paſture, wood, and ſo forth; that a recovery would not lie of a *town*, and that ſo many acres by *eſtimation* were *uncertain*. Objection 2d, That others were deſcribed thus; "all that *part* of the *town* and *lands*, "&c. *now or late* in the *tenure* of ſuch and ſuch a perſon," which was *vague* and *uncertain*. Objection 3d, That two parcels were deſcribed as "containing a *plough-land*," which was alſo *vague* and *uncertain*.

In reſpect of the premiſes in the *city*, he objected, that they were all demanded by the deſcription of "*meſſuage or tenement*," which

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MASSEY *versus* RICE.

which was uncertain, and alſo as being ſaid to be "*now or late* "in the tenure, *&c.*" He inſiſted that a recovery has no effect till execution executed. 1 *Rep. Shelley's* caſe. Sir *William Jones*, 10 *Str.* 1185. Therefore the deſcription of the premiſes ſhould be ſo certain, that the ſheriff may know how to execute it: And if bad in ejectment, a *fortiori* in a *præcipe*. *Bur.* 144. 1596. 1601.

To ſhew that the *nature* and *quality* of the *land* ought to be ſet out, he cited 1 *Inſt.* 4.—11 *Co.* 25. *b.*

To ſhew that theſe deſcriptions would be bad in ejectment for want of ſetting out the *quality* of the land, he cited *Savel's* caſe, 11 *Co.* 55. 1 *Rol Rep.* 55. *pl.* 29. *S. C. Bridgeman* 56. 1 *Salk.* 254. *Cro. Jac.* 124. *Cro. Car.* 57 .

To ſhew that both *quantity* and *quality* ſhould be ſet out, *Styles* 193. *Ley* 82. "four acres by *eſtimation* is *uncertain.*" *Salk.* 254. 4 *Mod.* 98. *S. C.* 1 *Show.* 338. As to the uncertainty of the deſcription, "*meſſuage or tenement,*" he cited 3 *Wilſ.* 23. where judgment was arreſted on this ſingle objection. *Moor* 691. *Popham* 22. If the deſcription in theſe recoveries are good, there would be no neceſſity for any deſcription at all. With reſpect to the 2d objection, he inſiſted, the deſcription was uncertain throughout. For *part of a town* might be any quantity: It might be a moiety, or more or leſs. So, the words "*now or late* "*in the tenure,*" are equally vague: Conſequently, the ſheriff, by this deſcription, could have no means of finding out the premiſes. As to the word "*plough-land,*" he ſaid it was applicable to every thing that affords food for a family, and ſo vague, that in 1 *Inſt.* 69. *a.* Lord *Coke* ſays, "a fine ſhall not be received *de una vir-* "*gata terræ* for the uncertainty." He alſo cited 1 *Leon.* 188. to ſhew that a *fine* of a *tenement* is uncertain: and ſubmitted upon theſe authorities, that the deſcriptions were all defective. 2*dly*, He contended, that if only *one* deſcription in each recovery was bad, the judgment muſt be reverſed *in toto*, becauſe *entire*; and therefore not to be divided: and cited *Cro. Car.* 471. *Str.* 807. *Cro. El.* 162. 1 *Leon.* 149. 1 *Rol. Abr.* 775. *pl.* 2. *Carthew* 235. 2 *Str.* 934.

Lord MANSFIELD.—There are fourteen different deſcriptions of lands in theſe common recoveries. Single out which is the ſtrongeſt.

Mr. *Buller* inſtanced the following: All that meſſuage or "tenement, with the appurtenances, ſituate in the lane between "the two Abbey Gates, with its appurtenances called, *&c.* now

1775. " or late in the poſſeſſion of *J. C.* his undertenants or aſſigns, " in the county of the *city* of *Limerick*."

MASSEY *verſus* RICE.

Lord MANSFIELD.—I remember a caſe in ejectment, where there was a doubt how execution ſhould be executed; and the court directed an iſſue to guide the ſheriff in delivering execution. *Mountain* has been held a good deſcription of lands in *Ireland*; and it was mountain-land in a valley. *Vide* 1 *Str.* 71.

Mr. *Alleyne*, *contra*, ſaid he ſhould conſider, 1*ſt*, What degree of preciſion is required by the *Regiſter* to the deſcription of lands demanded in a *præcipe quod reddat*. 2*dly*, What indulgence was to be given to a common recovery as a conveyance and common aſſurance. 3*dly*, Whether from the *locality* of theſe particular lands the deſcriptions were not ſufficient. 1*ſt*, It is a general rule that the form of the regiſter muſt be followed, but there are caſes that admit of a deviation from it. The general principle upon which all forms are founded and upheld is, that the defendant may know what he has to defend; and therefore, whenever the term uſed either in reſpect of the quantity or the quality, is ſufficiently certain and notorious to anſwer that purpoſe, it will be good, though not particularly named in the regiſter. 1 *Rol. Rep.* 165. 2*dly*, Great favour is to be ſhewn to common recoveries, becauſe they are now a ſpecies of conveyance and common aſſurance of land. They are not like the caſes cited, moſt of which are caſes in *ejectment*, which are *adverſary* ſuits, and where the objections aroſe in conſequence of ſome eſſential defect, which is fatal. But a common recovery is in the nature of an amicable ſuit, which admits of a greater latitude, and any deſcription that would be good in a deed, would be good in a common recovery. 5 *Rep.* 40. *Popham* 22. *S. C.* 3*dly*, With regard to the *local* ſituation of theſe lands in *Ireland*, it has been always underſtood that the judges of *Ireland* know the deſcription of lands in that country better than the judges of this court; and therefore credit ought to be given to their knowledge. It was ſo expreſsly held in *Macduncoh* v. *Stafford*, 2 *Roll. Rep.* 166. 1 *Str.* 71. 1 *Bur.* 623—9; which laſt caſe in principle anſwers all the objections that have been made to-day. Another argument ariſes upon the ſtatutes of *Jeofails*, which is, that being after verdict, they are now too late. As to the objections made to the particular deſcription of theſe lands, 1*ſt*, The word "*town*" in *Ireland* does not mean as it does here, houſes inhabited, but is merely a technical deſcription of a particular diſtrict, and is notorious there.

2*dly*,

2*dly*, With reſpect to the uncertainty of "ſo many acres by "*eſtimation*," it is ſufficient if the general boundary be known; it is not neceſſary that the preciſe meaſure ſhould be accurately and exactly aſcertained; and as to the term land, in legal acceptation it always means arable. 3dly; Here the term meſſuage or tenement does not ſtand alone as in the caſe cited, but is accompanied with other words deſcriptive of its ſituation; ſuch as, "the lane between the two abbey gates, *&c.*" which render it ſufficiently certain for the ſheriff to deliver poſſeſſion: Beſides, it is the ſame deſcription as is uſed in the deed of ſettlement by which the eſtate was entailed. Therefore even if the deſcriptions were more doubtful, the court will make ſuch a conſtruction as will ſupport them. 2 *Mod.* 233.

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Upon a ſecond argument, Serjeant *Walker* for the defendant cited, 1 *Ventris* 52. 2 *Ventris* 31. 2 *Wilſ.* 116. Mr. *Wallace* for the plaintiff cited *Popham* 203. *Noy* 86.

Lord MANSFIELD.—The conſequences of theſe objections are ſo great; they are ſo void of the leaſt glimmering of reaſon and common ſenſe; and it would be attended with ſuch vaſt inconveniences to the public in many caſes, without a poſſibility of doing good in any, if in common recoveries which are a ſpecies of conveyance and common aſſurance, ſuch nice exceptions were to prevail; that the ſtricteſt proof of their being founded in law is neceſſary, to induce the court to overturn a recovery on ſuch grounds.

By the ſettled law of the land, men by deeds may fetter their eſtates: But tenant in tail when of age may unfetter them, obſerving a certain form. In this caſe there can be no doubt of the meaning of the tenant in tail, or of his power to unfetter this eſtate. The only queſtion is, Whether he has done it agreeable to the proper form? that is, Whether he has deſcribed the premiſes with ſufficient certainty? Now the deſcription which he has uſed, is the identical deſcription in the deed which created the fettering; and the objection which is made, is not ſo much that that deſcription is uncertain, as that ſix or ſeven hundred years ago, in an *adverſe* action, there was a doubt whether ſuch an objection would not have lain: and therefore the defendant would make the ſame objection and raiſe the ſame doubt now. But a common recovery is not an adverſe action.

It is ſaid that "all that meſſuage or tenement with the ap- "purtenances ſituate in the lane between the two abbey gates, "now

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" now or late in the occupation of *J. C.* his undertenants or " aſſigns, in the county of the city of *Limerick*," is too vague and uncertain. But one muſt look with a microſcopic eye to diſcover that a *meſſuage or tenement*, &c. is ſo uncertain a deſcription, as that the ſheriff or any other perſon could not know how to find the premiſes by it: And the objection can only be made by a perſon who pores over the ſyllables of the words.

The objections are of two ſorts, and I have no doubt as to either. 1ſt, That the premiſes in the county are demanded thus: " All thoſe the *caſtles*, *towns*, and *land*, containing by *eſtimation*, " &c." which it is argued is uncertain both in reſpect of quality and quantity. As to that, it is admitted that " *caſtle*" is a good deſcription in *England*. " *Town*" was determined to be a good deſcription in *Cottingham* v. *King*. 1 *Bur.* 623. And " *land*" means *arable* land.

The next objection is, that the premiſes in the city are deſcribed thus; " All that *meſſuage or tenement*, with a garden or meadow " thereto belonging, ſituate, *&c.* and *now or late* in the occupa- " tion of, *&c. &c.*" which it has been contended would be a bad deſcription in *ejectment*. There are many caſes in ejectment which have gone very far indeed: And therefore the doctrine of thoſe caſes ought not to be extended. As to the authority in 3 *Wilſ.* 23. which would have great weight on account of its being ſo recent, the judges in that caſe decided againſt their own private opinion and inclination, becauſe they held themſelves bound by authority. But there, the words were only " *meſſuage or tenement*" without any other deſcription. Here there are other words " with the appurtenances and a garden, *&c.*" which ſhew that " meſſuage or tenement" are two words for the ſame thing: And that both mean a dwelling-houſe.

But this is not my fundamental ground of determination in the preſent caſe. What I ground my opinion upon is, the principles laid down in *Dormer*'s caſe, 5 *Co.* 40. *b.* reported alſo in *Popham* 23; and the diſtinction the court there take, between adverſe actions and common recoveries; which at that time were become a common aſſurance and conveyance of lands, *&c.* and which the court ſay, " being alſo made by aſſent between the parties, " ſhall, and always have had a different expoſition from what is " given to a recovery by *pretence* of title, or to the proceeding " in any other real action to which they are not to be compared:

" Therefore

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" Therefore a common recovery may be ſuffered of an advow-
" ſon, common in groſs, warren, and the like, and the intent of
" the parties ſhall be obſerved." Now the objection in this caſe is an objection to the very ſame deſcription as is uſed by the anceſtor in the deed which created the entail. The ſole object of the recovery is to unfetter the premiſes ſo entailed; and therefore I will not depart from this anciently eſtabliſhed principle to do ſuch cruel injuſtice, both againſt the intention of the parties, and againſt public convenience. Not one precedent has been cited where ſuch an objection has been held good in the caſe of a common recovery. But a caſe of a fine has been cited where it was allowed, and from thence it has been argued by analogy, that it is bad in a common recovery; but the argument does not hold.

I agree with Mr. *Wallace* that the argument of the defendant not having made the objection in the firſt inſtance, is of no weight. But Serjeant *Walker* cited a caſe from 2 *Ventris* 31. which is very material; and is ſhortly thus: " In ejectment a
" ſpecial verdict found, that there was a *pariſh* of *Ribton* and a
" *vill* of *Ribton*, but the latter not co-extenſive with the for-
" mer; and that the tenant in tail of lands *in* the *pariſh*, but
" *out* of the *vill*, bargained and ſold the lands in the pariſh of
" *Ribton*, with covenant to levy a fine and ſuffer a recovery to
" the uſes of the deed: But the fine and recovery were only of
" the *lands* in *Ribton*: The queſtion was, Whether this recovery
" was good for the lands in the *pariſh* of *Ribton*." It was argued " that the common law knows no ſuch diviſion of the
" kingdom, as pariſhes, but only the diviſion of vills; and there-
" fore, where a place is named in the record of the law, and no
" more ſaid, it is always intended a vill: Conſequently, that
" the recovery, if it paſſed any lands at all, could only paſs thoſe
" in the vill." But the court in favour of common recoveries held, " that this recovery ſhould extend to the lands in the
" *pariſh* of *Ribton*; and the rather, becauſe it being found by
" the verdict that the tenant in tail had *no lands* in *the vill*, the
" recovery muſt neceſſarily be void, unleſs it were extended to
" the lands in the pariſh." This deciſion is an inſtance of liberality that would not have been adopted or followed in an adverſe *præcipe*. So in many other inſtances; as an *advowſon*, for which no adverſe action will lie, but a common recovery will. Therefore as the diſtinction between amicable and adverſe ſuits exiſts; as the inconveniences of avoiding the recovery would

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would be great, as no precedent in point is produced, and there is no poſſibility of doubt about the intent of the parties, I am clearly of opinion that the judgment of *R. B.* in *Ireland* ought to be affirmed.

The three other judges concurred.

*Per Cur.* Judgment affirmed.

*Tueſday, Nov.* 14th.

LOVEACRES ex dim. MUDGE *verſus* BLIGHT, et Uxor.

One deviſes thus: "as "*touching* "*my world-*"*ly eſtate,* "I deviſe "the ſame "as fol-"lows; *I* "give to "my wife "*E. M.* 5*l.* "*to be paid* "*yearly* out "of my eſ-"tate at "*G. Item,* "to *T. M.* "and *E.* "5*l.* each, "to be paid "twelve "months "after my "deceaſe. "*Item* to "my two "ſons *T.* "*M.* & "*R. M.* "whom I "make my "and or-"dain my "*ſole execu-*"*tors, all* "my *lands* "and *tene-*"*ments free-*"*ly to be en-*"*joyed* and "poſſeſſed "alike." *T. M.* and *R. M.* are *tenants in common,* and take a *fee.*

IN Ejectment a ſpecial caſe was reſerved; the material facts of which were as follow: That *John Mudge* being ſeiſed in fee of the premiſes in queſtion by his laſt will, bearing date the 5th of *Auguſt* 1741, deviſed as follows: "*As touching ſuch* "*worldly eſtate,* wherewith it hath pleaſed God to bleſs me in "this life, I give, *demice* and diſpoſe of the ſame in the follow-"ing manner and form: Firſt of all I give and bequeath to "*Elizabeth Mudge* my dearly beloved wife, the ſum of five "pounds to be paid *yearly out of my eſtate* called *Gloze,* and alſo "one part of the dwelling-houſe being the weſt ſide, with as "much *Woodcroft home at her,* as ſhe ſhall have need of, by my "executors hereafter named. I give and bequeath unto my "ſon *Thomas Mudge* the ſum of five pounds, to be paid twelve "months after my deceaſe. I give unto my grand-daughter "*Elizabeth* the ſum of five pounds to be paid twelve months "after my deceaſe. *Item,* I give unto *John Mudge* and *Robert* "*Mudge,* my two ſons, whom I make my "and ordain my *ſole executors* of this my laſt will and teſtament, "*all* and ſingular *my lands* and meſſuages by them *freely to be* "*poſſeſſed* and enjoyed *alike*; and I do hereby utterly revoke and "diſannul all former wills and legacies and executors by me in "any ways before named, willed and bequeathed, ratifying and "confirming this and no other to be my laſt will and teſtament. "In witneſs whereof I have hereunto ſet my hand and ſeal the "day and year firſt above written, *John Mudge.*

"Before the ſealing of this will, I give to my wife *Eli-*"*zabeth Mudge,* all my houſehold goods to be deli-"vered by my executor, and after *my* death the ſaid "goods parted equally, be parted between the exe-"cutors alike."

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LOVE AGREE. verſus BLIGHT.

That the teſtator died leaving three ſons; *Thomas*, *John*, and *Robert*: That *Thomas*, the eldeſt, died, leaving the leſſor of the plaintiff his eldeſt ſon; that *Robert* died ſoon after the teſtator, and *John* in *April* laſt, leaving iſſue. That the eſtate in queſtion was worth 20 *l. per annum*, and the perſonal eſtate of the teſtator worth 60 *l.*

The queſtion was, Whether the plaintiff is entitled to recover the premiſes in queſtion?

Mr. *Wilſon* for the plaintiff, ſtated the queſtion to be, *what eſtate Robert* and *John Mudge* took in the premiſes; and inſiſted they took an eſtate for *life* only. 1ſt. Becauſe there are no *technical* words of *limitation*, nor words expreſſive of the teſtator's intereſt in the premiſes: Only "*lands* and *meſſuages*." 2dly, no *circumſtances* or expreſſions that ſhew an apparent *intention* in the teſtator to paſs a *fee*. The circumſtances from which it will be contended that ſuch intention does appear, are theſe: Firſt, the words "*freely to be poſſeſſed and enjoyed*;" but they may be fully ſatisfied by the deviſees enjoying the premiſes for life: And it is enough for the plaintiff, if they do not neceſſarily manifeſt an intention to give a fee; which they certainly do not. 2dly, that the eſtate is charged with an annuity of 5 *l.* to the teſtator's wife: But here the annuity is a *charge* upon the *land* (let who will be in poſſeſſion), not on the *perſons* of the deviſees; therefore not within the principle of the caſes which ſay, that the payment of a ſum of money ſhall give a fee. 3dly, The introductory words "*as touching my worldly eſtate*;" but theſe words *alone* do not import an intention to diſinherit the heir at law; and therefore are not of themſelves ſufficient to carry a fee. Where the word *eſtate* is uſed throughout a will, it may be held auxiliary; but here, in the clauſe upon which the objection ariſes, the teſtator has ſtudiouſly avoided uſing the word eſtate, and inſerted *meſſuages* and *lands* in its ſtead. 4thly, Some argument may be attempted from the legacy given to the heir at law; but no inference ariſes from that circumſtance, becauſe it is made payable out of the perſonal eſtate. Therefore, upon the whole of the will, there are no circumſtances which ſhew an apparent intention in the teſtator to give his younger ſons a fee; at leaſt the intent is ambiguous; and if ſo, the heir at law is entitled. But ſuppoſing they took a fee, the plaintiff is entitled to a moiety.

Lord MANSFIELD.—Reſerve that queſtion.

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Mr. *Kerby contra.* Upon the firſt queſtion, the only matter for the conſideration of the court is, Whether upon the whole of the will taken together, enough appears to ſhew the teſtator intended his younger ſons ſhould take a fee. That he did, is manifeſt; 1ſt, from the introductory words, "*as to all my worldly eſtate.*" And ſo it was held in *Forreſter* 157. *Ibbetſon* v. *Beckwith.* 1 *Wilſ.* 133. 3 *Wilſ.* 143. and in a late caſe *Hogan ex dim. Wallis and others* v. *Jackſon.** 2dly, From the *annuity* to his wife, which is a charge on the *perſon:* For the words "*by my executors*" refer to the *whole* ſentence; and therefore are equivalent to a deviſe to his executors "*they paying*" *&c.* which will give a fee. 3 *Bur.* 1534. 3dly, The legacy of 5*l.* to his eldeſt ſon, ſhews he did not mean him to be the object of any further bounty. 4thly. The omiſſion after the words "whom I make my", may be aptly ſupplied by the word "*heirs*", which would put an end to the queſtion. 5thly, The words "*freely to be enjoyed by them,*" ſhews the teſtator meant to give it as fully and freely as he had enjoyed it himſelf. 6thly, Before the ſealing his will he gives his wife the houſhold goods, and deviſes them over after his death to his two younger ſons.

* *Ante*, 299.

It is clear from hence that he thought his wife would otherwiſe take the abſolute property in them: And therefore it is a fair inference to ſay, that not diſtinguiſhing between real and perſonal eſtate, he thought the *whole* intereſt in the *real* eſtate paſſed, as the perſonal eſtate would have done, if he had not added the ſubſequent limitation. From all theſe circumſtances, enough appears to ſhew the teſtator meant a fee, and therefore the plaintiff ought not to recover.—As to the ſecond queſtion, he inſiſted that the deviſees were *joint tenants*; and therefore that the ſhare of the deceaſed brother ſurvived to the defendant.

Mr. *Wilſon contra*, as to the ſecond queſtion contended, that the words "to be enjoyed *alike*" made them *tenants in common*; for the word "alike" is equivalent to "equally" which has been held to create a tenancy in common. And this was clearly the intention of the teſtator: For he was providing for his children; therefore it is not natural to ſuppoſe that he meant the ſurvivors ſhould take the whole, and ſo leave the family of the ſon who died firſt deſtitute.

Lord MANSFIELD.—The principles by which this caſe muſt be governed, are ſettled by analogy to eſtabliſhed rules reſpecting the

the limitation of eſtates by deed at common law. If a man by deed of conveyance at common law gives land to another *generally, without* words of *limitation*, the donee has only an eſtate for *life*. But I really believe, that almoſt every caſe determined by this rule, as applied to a deviſe of lands in a will, has defeated the real intention of the teſtator. For common people, and even others who have ſome knowledge of the law, do not diſtinguiſh between a bequeſt of perſonalty, and a deviſe of land or real eſtate. But, as they know when they give a man a horſe, they give it him for ever; ſo they think if they give a houſe or land, it will continue to be the ſole property of the perſon to whom they have left it. Notwithſtanding this, where there are no words of limitation, the court muſt determine in the caſe of a deviſe affecting real eſtate, that the deviſee has only an eſtate for life: Becauſe the principle is fully ſettled and eſtabliſhed, and no conjecture of a private imagination can ſhake a rule of law.

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But as this rule of law has the effect I have juſt mentioned, of defeating the intention of the teſtator in almoſt every caſe that occurs; the court has laid hold of the generality of other expreſſions in a will, where any ſuch can be found, to take the deviſe out of this rule. Therefore, if a man ſays, "I give "*all my eſtate*," that has been conſtrued to paſs *a fee*: or even if words of locality are added, as "*all my eſtate in A*;" it has been held, that the whole of the teſtator's *intereſt* in ſuch particular lands will paſs, though no words of limitation are added. 2 *P. Wms.* 524: Becauſe the law ſays, that the word "eſtate" comprehends not only the land or property which a man has, but alſo the *intereſt* he has in it. So in a late caſe from *Ireland**, the court had no difficulty in ſaying, that the words "*all my worldly ſubſtance*," in the introductory part of the will, meant every thing the teſtator had; and that the words "all his *real effects*," in the ſubſequent reſiduary deviſe, were equivalent to *worldly ſubſtance*, and carried every thing to the reſiduary deviſee. In general, wherever there are words and expreſſions, either general or particular, or clauſes in a will which the court can lay hold of, to enlarge the eſtate of a deviſee, they will do ſo to *effectuate* the *intention*. But if the *intention* of the teſtator is *doubtful*, the rule of law muſt take place. So, if the court cannot find words in the will ſufficient to carry a fee, though they ſhould themſelves be ſatisfied beyond the poſſibility of a doubt, as to what the intention of the party was, they muſt adhere to the rule of law.

* *Hogan ex dim. Wallis verſus Jackſon, ante*, 299.

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LOVE-ACRES *versus* DAIGHT.

Now, though the introduction of a will, declaring that a man means to make a diſpoſition of *all his worldly eſtate*, is a ſtrong circumſtance, connected with other words, to explain the teſtator's intention of enlarging a particular eſtate, or of paſſing a fee where he has uſed no words of limitation, it will not do *alone*. And all the caſes cited in the argument, to ſhew that the introductory words in this caſe would *alone* be ſufficient, fall ſhort of the mark; becauſe they contained other words clearly manifeſting the intention of the teſtator to paſs a fee.

The queſtion is always a queſtion of conſtruction, and depends upon obſervations naturally ariſing out of the will itſelf. And therefore, if in this caſe there are words in the will which denote an intention in the teſtator to give his ſons more than an eſtate for life, the court will give effect to that intention.—Now if a man deviſe lands to another, *paying thereout* 100 *l.** or any other groſs ſum, though he add no words of limitation, yet the deviſee ſhall have a fee: becauſe unleſs he were to take a fee, he cannot be ſure of paying the 100 *l.* So if an eſtate be given to *A. to be ſold for payment of debts* and legacies †, the purpoſe to be anſwered makes it a fee, without words of limitation. In ſhort, wherever any thing is directed to be done, which, ſtrictly ſpeaking, an eſtate for life only may not be ſufficient to anſwer, the court will imply a fee.

* *Wellock v. Hammond.* 2 *Leo.* 114.

† 1 *Chan. caſes* 196-7.

Let us examine then the obſervations that ariſe upon this will. The firſt material obſervation upon which it has been argued that the teſtator meant to give his younger ſons a fee in this caſe, is, a bequeſt to his wife of an annuity of 5 *l.* &c. which he gives thus: "I give to my wife the ſum of 5 *l.* to be paid yearly out of "my eſtate called *Gloze*, and alſo one part of the dwelling-houſe "with as much wood-croft home *at her*, as ſhe ſhall have need of, "by my executors hereafter named." It is clear, that in this deviſe, ſome word is miſplaced or left out; and where that is the caſe, if it be neceſſary to diſcover the intention of the teſtator, the court may ſupply it. Now the moſt obvious word to be ſupplied here, as it ſtrikes me, is the word "requeſt;" *at her requeſt*, would make the ſenſe complete. Then, as to the deviſe itſelf, the 5 *l.* is directed to be paid by the executors out of the eſtate, and the wood is to be provided at all events; it therefore muſt be ſuppoſed to be brought home from off the eſtate. But if the executors were to take only an eſtate *for life*, they would not be able to pay the annuity during her life out of the profits only, or to furniſh all the wood ſhe might want; becauſe the ſtock on

the eſtate might fall ſhort. It is but reaſonable therefore to infer, that ſuch an intereſt was intended, as would enable them to comply with the teſtator's directions, fully and completely in every reſpect. 1775. LOVE-ACRES *verſus* BLIGHT.

It is not an immaterial obſervation that has been made upon the deviſe over of the houſhold goods to the executors, to be equally divided between them as the teſtator expreſſes it, "after "*my* death," which ſhould clearly have been "after *her death*."

The next obſervation ariſes upon the words "whom I make "*my*, and ordain, *&c.*" The word *my*, without ſome addition, means nothing at all. It cannot mean *executors*, becauſe the teſtator has expreſsly inſerted that word afterwards. It ſeems, therefore, moſt natural and proper to inſert the word *heirs*. But I reſt upon the other grounds, rather than upon the conjecture how the blanks ſhould be filled up.

The laſt obſervation is drawn from the words "*freely to be* "*poſſeſſed and enjoyed by them alike.*" Now the word "*freely*," ſtrikes me as a very material word: For the teſtator has charged the eſtate with the payment of the annuity to his wife, *&c.* ſo that he could not mean by the word "*freely*" to give it *free of incumbrances*. The free enjoyment, therefore, muſt mean, *free from all limitations*; that is, the abſolute property of the eſtate.

Upon theſe obſervations ariſing on the face of the will itſelf, coupled with the introductory clauſe, I am of opinion upon the firſt queſtion, that the teſtator's intention was to give his ſons *John* and *Robert* a fee. If ſo, it is equally clear upon the ſecond queſtion, that this is a *tenancy in common*. The word "*alike*" is the ſame as the word "*equally*," and in the deviſe of the houſhold goods, the teſtator has made uſe of the word *equally*. Therefore the leſſor of the plaintiff is entitled to a moiety.

The three other judges concurred.

*Per Cur.* Judgment for the plaintiff for one moiety.

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## GOODWIN *verſus* CROWLE, Executor.

*Friday, Nov.* 17th.

ERROR from *C. B.* in an action of debt, to recover a penalty for the non-performance of articles of agreement, between the plaintiff and the defendant's teſtator.

In debt for a penalty, for non-performance of covenants, judgment on demurrer 3. *c.* 11. but

The agreement was, that the defendant in the original action, now the plaintiff in error, ſhould ſink a pit for the teſtator, and

rer may be entered up for the penalty, in like manner as before the *ſtat.* 8 & 9 *Wm.* then it can ſtand only as a *ſecurity* for the *damages ſuſtained.*

1775.

GOODWIN *verſus* CROWLE.

*begin to work within* 14 *days* after the date of the agreement, and continue working and ſinking the ſame, day and night, the ſix working days in the week, till it ſhould be completed. The *breach* aſſigned was, that he did *not* begin to ſink the pit in the articles mentioned *within* 14 *days* from the date of the ſaid agreement, and *continue* ſinking the ſame, *&c. prout* the articles. The defendant pleaded, that he was *ready to begin within the* 14 *days*; but that it was agreed between him and the teſtator, that *before he began to ſink* the pit, he ſhould drive or *ſink* a ſlough or *drain*, &c. and averred that he did immediately begin to ſink the ſaid drain; but before the ſaid drain could be ſunk, 20 days had elapſed; by reaſon whereof he could not begin to work the pit within the 14 days. Upon demurrer to this plea, and argument thereon, the court of *C. B.* gave judgment for the plaintiff, which he accordingly entered up for the whole penalty 250*l.* and 23*l.* 10*s.* coſts.

Mr. *Buller* for the plaintiff in error, objected, upon the errors aſſigned, 1*ſt*, That it did not appear by the record that the plaintiff had ſuſtained any damages. 2*dly*, That no writ of inquiry had been awarded to aſcertain the damages. 3*dly*, That the judgment ought not to have been taken for the whole penalty—but only entered up as a ſecurity.

He argued, that ſince the ſtatute 8 & 9 *Wm.* 3. *c.* 11. *ſect.* 8. the plaintiff cannot take judgment for the whole penalty, any further than as a ſecurity for the performance of the covenants; therefore the damages ought to have been aſcertained by a writ of inquiry. At common law the party was at liberty to take out execution for the whole debt: This drove defendants into Chancery; where, if compenſation could be made, the court would not ſuffer the penalty to be taken. The occaſion of this ſtatute was to moderate the rigour of the law. And ſince the ſtatute, this court has the ſame juriſdiction as the Court of Chancery had before. In reaſon and conſcience, the plaintiff ought not to retain the whole penalty, but only to be indemnified *quoad* what he has ſuffered: and cited *Drage* v. *Brand*, 2 *Wilſ.* 377. as in point. Alſo a later caſe, *Lys* v. *Hutchins*, 18th *June* 1773, in *Cam. Scacc*; but there the court were not all of the ſame opinion, and it went off upon the inſolvency of one of the parties. Here the plaintiff has elected to proceed under the act of parliament; for the declaration contains a *double* breach. 1*ſt*, *Not beginning* within fourteen days. 2*d*, *Not continuing* to work, *&c.* which would not have been good at common

mon law. 1 *Roll.* 112. *Saunders* verſus *Crawley.* Conſequently the plaintiff is now bound to abide by the direction of the ſtatute, and cannot take advantage of the penalty. 1775.

GODWIN *verſus* CROWLE.

Mr. *Wood* for the defendant. Two objections have been taken to the judgment. 1ſt, That there ought to have been a writ of inquiry before final judgment. 2dly, That the judgment ought to have been entered up only as a ſecurity. The caſe of *Drage* verſus *Brand*, depended upon the firſt branch of the ſtatute. The court of *C. B.* thought the plaintiff had made his election to proceed upon the ſtatute; and, therefore, that the defendant ought to have the ſame advantage. There, *ſeveral* breaches were aſſigned; and the cauſe had gone down to trial, ſo that the ſame jury might have aſſeſſed the damages. But here, the plaintiff has in fact aſſigned only *one* breach: the covenant is one ſingle ſentence, "that he "ſhall begin within fourteen days, and continue to work," &c.

But ſuppoſe it were neceſſary for the plaintiff to have ſet out the breaches, and have a writ of inquiry; yet the judgment is regular, and he may now do it. By the ſtatute, it muſt be the ſame judgment as before; that is, a judgment for the penalty, and it is to ſtand as a ſecurity. Therefore, the form of the judgment is right.

Lord MANSFIELD.—The true conſtruction and ſubſtantial juſtice of the act is, that the penalty ſhall not be levied in any caſe whatever; but the judgment in this caſe being upon demurrer, it muſt be as uſual, to recover the debt. The ſtatute directs that the judgment ſhall be entered as heretofore; but then it is only to ſtand as a ſecurity for the damages ſuſtained. The plaintiff is not to aſſign the breaches till after the judgment is given.

If the plaintiff ſhould take out execution for the whole penalty, then is the time to complain: but there is no objection to the judgment as it ſtands; and on that ground only the court give their opinion that the judgment muſt be affirmed.

*Per Cur.* Judgment affirmed.

Lord MANSFIELD added, that in caſes where the court of Chancery order a judgment to be given as ſecurity, it is entered up in the uſual form, but the party cannot take out execution upon it for the ſum in which it is given.

1775.

Tuesday, Nov. 21st.

## FREEMAN *verſus* The Duke of CHANDOS *et al. et e contra.*

A remote reverſion in fee held to paſs under *general words* in an act of parliament, by way of ſettlement in execution of articles, tho' the reverſion was not particularly in contemplation at that time; the general words being ſufficient to carry it: and the intention of the parties being to include *all* the eſtate of the ſettlor.

THIS was a caſe out of Chancery for the opinion of this court, the material facts of which were as follow:

Mr. *Francis Keck* being ſeiſed in fee of the reverſion of the eſtate in queſtion, by his will, bearing date the 29th of *June* 1728, deviſed the ſame to his ſon *John*, and the heirs of his body; with remainder to his only daughter *Mary*, and the heirs of her body; with remainder to his ſix grand nephews, *Ferdinando*, *Anthony*, *Thomas*, *William*, *John*, and *Robert* (of whom *John Tracy Atkins* was the ſurvivor,) ſucceſſively for life, but not in order of ſeniority, and to their firſt and other ſons ſucceſſively in tail male, with remainder to his own right heirs, and died on the 29th of *September* 1728.

*John* the ſon died on the 23d *July* 1773, without iſſue, and inteſtate as to this reverſion: whereupon all the other nephews being dead without iſſue, it deſcended in equal ſevenths on the ſeven ſurviving ſiſters of *Francis Keck* as coparceners; of whom *Winifred* the wife of *John Nichol* was one, and *Mary* the mother of Mr. *Freeman* the plaintiff was another.

In 1740 *Winifred Nichol* died, without having deviſed or diſpoſed of the reverſion of her undivided ſeventh part of the ſaid eſtate; and thereupon the ſame deſcended on her only ſon and heir *John Nichol*, father of Lady *Carnarvon* aftermentioned.

*John Nichol* the ſon, by will dated the 5th of *March* 1746, gave all his real and perſonal eſtate to truſtees in truſt for his daughter *Margaret Nichol* at 21, and her *heirs*; and if ſhe died before 21, leaving *iſſue of her body*, then in truſt to convey the ſame to the *heirs of her body*.

Overtures having been made for a marriage with Miſs *Nichol* to the Marquis of *Carnarvon*, propoſals were laid before the maſter, entitled propoſals for a ſettlement, &c. *viz.* "That in conſideration of the ſaid marriage and *fortune* in *money* and *lands* of Miſs *Nichol*, to be diſpoſed of as aftermentioned, &c. it was thereby agreed, that as ſoon after the marriage as the ſaid *Margaret Nichol* ſhould attain the age of 21 years, the *freehold* and *copyhold* eſtates of her *grandfather* and *father*, ſhould be ſettled upon the truſts there mentioned."

The

1775.

FREEMAN *versus* Duke of CHANDOS.

The Maſter reported the propoſals proper, in conſequence of which articles were to be approved of, and were accordingly approved of by the Maſter.

The articles recited the propoſals, they alſo recited all the real and perſonal eſtates which Miſs *Nichol* was entitled to, under her grandfather and father's will, and the particulars were ſet out in ſeveral ſchedules by the Maſter; and it was thereby agreed, that they ſhould be ſettled to the uſes there mentioned. Upon the Marchioneſs coming of age, an act of Parliament 22 *Geo.* 2. *c.* 24. was made, intitled, "An act for ſettling the real and "leaſehold eſtates of the moſt honourable *Margaret Brydges*, "commonly called Marchioneſs of *Carnarvon*, wife of the moſt "honourable *James Brydges*, Eſquire, commonly called Mar-"quis of *Carnarvon*, and late *Margaret Nichol* ſpinſter, an in-"fant, for the benefit of the ſaid Marquis and Marchioneſs and "their iſſue; and for applying part of the perſonal eſtate of the "ſaid Marchioneſs for the purpoſes therein mentioned."

The act reciting the propoſals, articles, *&c.* enacts, "That "*all* and ſingular the *freehold* and *copyhold eſtates* of the "ſaid *Margaret* now Marchioneſs of *Carnarvon* (except as is "therein excepted) in the third and fourth ſchedule to the "articles mentioned, and *all other* the manors, meſſuages, lands, "tenements and hereditaments, freehold and copyhold, of the "grandfather and father of the ſaid *Margaret*, ſituate in the "ſeveral pariſhes of St. *Andrew*, *Holborn*, &c. or *elſewhere* in "*London*; and in the ſeveral pariſhes of *Fryern*, *Barnes*, &c. or "*elſewhere* in the county of *Middleſex*; and in the pariſh of South "*Stoneham* or *elſewhere* in the county of *Southampton*, and ELSE-"WHERE, *&c.* ſhall be veſted and ſettled to the uſes therein "mentioned." The only variation between the articles and the act was, that certain debts of the Marquis were to be paid, and in conſideration of the Marchioneſs agreeing thereto, all her eſtates were to be ſettled upon her and her heirs, in caſe ſhe ſurvived the Marquis having no iſſue, or failing iſſue between them.

At the time of the marriage and alſo at the time of paſſing the act, *Robert Tracy*, *Anthony*, *Thomas*, and *John* were alive, and *Thomas* had then a ſon living named *Dodwell*.

*Margaret* Marchioneſs of *Carnarvon* died on the 14th day of *Auguſt* 1768, without iſſue, and without having made any diſpoſition of the ſaid eſtates of her late grandfather and father, and inteſtate.

Mr.

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FREEMAN *verſus* Duke of CHANDOS.

Mr. *John Tracy Atkins* died on the 23d of *July* 1773, without iſſue; and then the reverſion of the eſtates now in queſtion dropt in, and devolved on the co-heirs of the ſaid *Francis Keck*, or the perſons claiming under them: and the Duke of *Chandos* having claimed the ſhare late belonging to Lady *Carnarvon*, and the co-heirs oppoſing the claim, Mr. *Freeman* filed a bill in *Chancery* againſt the Duke and all the other claimants for a partition, and by his bill controverted the Duke's claim, and his Grace filed a croſs bill to eſtabliſh it.

The queſtion was, Whether the reverſion in fee of one undivided 7th part of the eſtate in queſtion, paſſed under the act of parliament to the defendant the Duke of *Chandos?*

Mr. *Buller* for the defendant argued, that the intention of the parties was, to ſettle *all* the eſtate both real and perſonal of Miſs *Nichol*, except what was particularly excepted: that the *propoſals* were *general*, without *any* exception; that both the articles and act of parliament, were intended to carry the propoſals into execution; and that the words "and *elſewhere*" in the enacting part of the ſtatute page 17*. were ſufficient to carry the reverſion of this undivided 7th part, though not expreſsly mentioned. And if ſo, the court would give effect to ſo material a word, rather than reject it; more eſpecially as this was the caſe of a *deed*; and cited 3 *P. Wms.* 56.

* *Vide* the words of the enacting clauſe before mentioned.

Mr. *Kenyon*, *contra*, for the plaintiff ſaid, he did not deny that the words were large enough to carry the reverſion in queſtion, if it appeared to be the clear intention of the parties that it ſhould paſs. But he denied there was any ſuch intention. And if ſo, the court would control the operation of the words "and "*elſewhere*" which were a looſe general expreſſion, rather than give it effect contrary to the intent of the parties. And ſo it was done in the caſe of *Strong* verſus *Teat*, 2 *Burr.* 912. Here, the propoſals moved from the Duke of *Chandos*, whoſe object it was to get as much of the property of Miſs *Nichol* as he could. That there was not a ſurmiſe of this reverſion even being known to the Maſter; that the articles extended to nothing more than was contained in the propoſals; and that the act of parliament did not include even ſo much. Conſequently, as nothing appeared in either of theſe inſtruments from which it could be collected that the parties had this reverſion in views at the time, the court would reſtrain the generality of the expreſſion to thoſe eſtates only, which were in the contemplation of the parties.

Lord

1775.

FREEMAN *versus* Duke of CHANDOS.

Lord MANSFIELD.—The material point in this case is, what the meaning of the parties was, *before* the passing of the act: that is, whether any thing was then in contemplation, except what the Marchioness was in possession of.—I have seen settlements in which it has been provided, that if any estate shall descend to the wife during coverture, it shall be settled to such and such uses in the settlement named. In this case, the reversion was after four sons and their issue; and one of them had then a son living; so that it could be of no great value. We will think of it. If we have any doubt, it may be argued again, but if clear we will make our certificate.

Afterwards, on the 28th of *November* in this term, the court certified in these words:

"Having heard counsel on both sides, and considered this "case, we are of opinion, from the propofals, report and articles, "that the *intention* of the parties was to settle *all* the real and "personal estate of Miss *Nichol* which she had from her father "or grandfather, except what was particularly excepted: "Though, probably, this remote reversion might not then be "in contemplation; and, therefore, the words of the articles do "not expressly include it. We consider the act of parliament, "as a settlement, to execute the articles, with the variations "mentioned in the preamble: and though this remote rever-"sion might not then be particularly thought of, yet the *gene-*"*ral* words are *sufficient* to include it; and the *intention* of the "parties was to include *all*. Therefore, we are of opinion, that "the *reversion in fee*, of one undivided seventh part of the estate "in question, *did pass*, by the act of parliament in the plead-"ings mentioned, to the defendant the Duke of *Chandos*."

## FREEMAN Esq. *versus* Duke of CHANDOS *et al. et e contra.*

*Same day.*

THIS was a branch of the last case and sent from the Court of *Chancery* also for the opinion of this court; the material facts were as follow:

One devises *all his estates*, &c. in the counties of *Gloucester* and *Worcester* and *elsewhere in the kingdom of England* to trustees *subject* to certain *charges* thereon, and *limitations* in his *marriage settlement* named; in *trust* to stand seised of the said estates in *G.* and *W.* or *elsewhere*, to certain uses. His estates in *G.* and *W.* were the only estates charged or mentioned in his marriage settlement. But he was also entitled to a reversion of certain estates in the counties of *Oxford* and *Wilts*. Held that this reversion passed by the words "*elsewhere in the kingdom of England*."

*Robert Tracy*, in whom the reversion in fee of one undivided seventh part of the *Keck* estate, (*vide* the last case,) was vested as claiming under one of the co-heirs of the said *Francis Keck*, made his will dated 16th of *October* 1766, and thereby devised "all

"and

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" and every his manors, meſſuages, lands, tenements, hereditaments, and premiſes with their and every of their rights, members and appurtenances, in the counties of *Glouceſter* and *Worceſter* and *elſewhere in the kingdom of England*, and all his eſtates, uſe, benefit and intereſt in reverſion, remainder or expectancy, to truſtees, ſubject to certain charges thereon, and to certain limitations and eſtates to all his brothers ſeverally, and their reſpective firſt and other ſons in and by his marriage ſettlement, bearing date the 5th of *Auguſt* 1735, expreſſed and declared; in truſt, in caſe he himſelf and his ſaid brothers ſhould all die without iſſue male of his or their body or bodies, or his ſaid brothers ſhould die before the age of 21, then, to ſtand ſeiſed of the ſaid eſtates in *Glouceſter*, *Worceſter* or *elſewhere* and the reverſion or reverſions of ſuch eſtates, and of all his eſtate, uſe, benefit, and intereſt in reverſion and expectancy therein to the uſes there mentioned."

By the marriage ſettlement of *Robert Tracy*, the eſtates in *Glouceſter* and *Worceſter* were limited to himſelf for life, remainder to his firſt and other ſons in tail male, remainder to his three brothers *John*, *Thomas*, and *Anthony*, and their ſaid firſt and other ſons, ſucceſſively in ſtrict ſettlement.

After the death of *Robert Tracy* without iſſue, on the 28th *September* 1767, *John Tracy* thinking the reverſion in queſtion did not paſs by the will of *Robert Tracy*, made a codicil to his own will dated *Auguſt* 1ſt 1768, and thereby deviſed the ſame to truſtees on the truſts there mentioned.

Lady *Hereford*, the firſt deviſee under *Robert Tracy*'s will, claimed this reverſion; as did likewiſe the deviſees under the codicil of *John Tracy*.

The queſtion was, whether the reverſion in fee of one undivided ſeventh part of the *Keck* eſtate veſted in *Robert Tracy* did paſs by the will of *Robert Tracy*?

Mr. *Kenyon* was about to argue for Lord *Hereford*, but Lord *Mansfield* called upon the other ſide to go on.

Mr. *Buller* for Mr. *Freeman* argued, that from the words of the will referring to the limitation of the eſtates in the counties of *Glouceſter* and *Worceſter* and the charges thereon, it was manifeſt the teſtator had no other eſtates than thoſe in contemplation, at the time of making his will; and therefore, the reverſion in queſtion, which was a reverſion of eſtates in *Oxfordſhire* and *Wiltſhire*, would not paſs by the words " *elſewhere in the kingdom of England*" and cited *Strong* verſus *Teat*, 2 *Bur.* 912. as in point.

Lord

1775.

FREEMAN *verſus* Duke of CHANDOS.

Lord *Mansfield* ſtopped Mr. *Kenyon*, ſaying it was too clear for him to give himſelf any trouble about it. If the words of the will are not ſufficient to carry the premiſes in queſtion, the dragnet of conveyances will never end.—Afterwards, on the 20th of *November* in this term, the court certified in theſe words.

"Having heard counſel on both ſides, and conſidered this "caſe, we are of opinion that the reverſion in fee of one undi- "vided ſeventh part of the *Keck* eſtate, veſted in *Robert Tracy*, "did paſs by the will of *Robert Tracy*."

## CHAMBERLIN *et al. verſus* SONGHURST.

*Friday, Nov.* 24th.

The additional toll to be paid by waggons overweight, muſt be according to the *progreſſive* proportions named in the *ſtat.* 14 *Geo.* 3. *c.* 82. *ſect.* 2.—Not a *groſs* charge at the *higheſt* additional toll incurred, upon the *groſs* overweight.

IN caſe, for money had and received to the plaintiff's uſe, the facts at the trial appeared to be as follows. The plaintiffs were owners of a waggon which paſſed loaded through a turnpike belonging to a turnpike road, called the *Kent* road.—The defendant was appointed by the truſtees of that road a collector of tolls, and to weigh carriages paſſing on the ſaid road under the ſtatutes 13 *Geo.* 3. *c.* 84. and 14 *Geo.* 3. *c.* 82. among other acts. The plaintiff's waggon weighed 18 hundred overweight. The defendant inſiſted upon being paid at the rate of 20 *s. per* hundred for the *whole* overweight, which by that mode of calculation amounted to 18 *l.* and was paid accordingly.—Upon the general iſſue pleaded, a verdict was found for the plaintiffs for 13 *l.* & 6 *d.* and coſts, ſubject to the opinion of the court on the following queſtion; "Whether the defendant ought to have received "at the rate of 20 *s. per* hundred for more than *three* hundred "weight of the *eighteen* hundred overweight."

In caſe he ought not to have received the whole ſum of 18 *l.* the *poſtea* was to be delivered to the plaintiffs. In caſe he ought to have received the whole ſum, a nonſuit was to be entered.

Mr. *Morgan* for the defendant argued, that by the conſtruction of the ſtatute 13 *Geo.* 3. *c.* 84. *ſect.* 1. and 14 *Geo.* 3. *c.* 82. *ſect.* 2. the defendant was entitled to take 20 *s.* additional toll for *every* hundred overweight, whenever ſuch overweight exceeded *fifteen* hundred weight, which it did in this caſe; and, therefore, that a nonſuit ought to be entered.

Mr. *Lucas*, *contra*, for the plaintiffs inſiſted, that ſo much of *ſtat.* 13 *Geo.* 3. *c.* 84. as empowers the truſtees to take an additional 20 *s. per* hundred for *every* hundred overweight, was repealed by *ſtat.* 14 *Geo.* 3. *c.* 82. *ſect.* 2. and that the ſum to be taken

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taken, as an additional toll for the overweight in this caſe, ought to have been calculated according to the following proportions mentioned in this latter ſtatute; *viz.* 3 *d. per* hundred weight for the 1ſt and 2d hundred weight; 6 *d.* for every hundred weight above two, and not exceeding five; 2 *s.* 6 *d.* for every hundred above five and not exceeding ten; 5 *s.* for every hundred above ten, and not exceeding fifteen, and 20 *s.* for every hundred above fifteen, which would have amounted only to 4 *l.* 19 *s.* 6 *d.* in all, inſtead of 18 *l.* which was the ſum demanded of, and actually paid by the plaintiff. And of this opinion was the court.

*Per Cur.* Poſtea delivered to the plaintiff.

## WILKINSON *qui tam, verſus* ALLOT.

*Monday, Nov.* 27th.

Where a *qui tam* informer in debt on the *ſtat.* 21 *Hen.* 8. *c.* 13. is nonſuited, the defendant is entitled to coſts.

IN debt upon the *ſtat.* 21 *Hen.* 8. *c.* 13. for non-reſidence, the defendant pleaded the general iſſue, and at the trial the plaintiff was nonſuited. Mr. *Davenport* for the plaintiff had obtained a rule to ſhew cauſe why the maſter ſhould not be reſtrained from taxing the defendant his coſts: and now in ſupport of the rule, inſiſted, that as the plaintiff, if he had recovered, would not have been entitled to coſts, it was neither legal, nor juſt, nor reciprocal, that in the event of his having failed, he ſhould pay coſts to the defendant. That by *ſtat.* 24. *H.* 8. *c.* 8. a defendant can have no coſts on a nonſuit or verdict, where the plaintiff ſues to the king's uſe, which was the caſe here; becauſe half the penalty belongs to the king: That the *ſtat.* 18 *El. c.* 5. *ſect.* 3. did not extend to this caſe, but only to caſes where the *whole* of the penalty belongs to the informer, or where he is the *party grieved*, and cited 1 *Anderſ.* 116. *pl.* 162. as expreſsly in point to this purpoſe.

Mr. *Partridge*, *contra*, mentioned the *ſtat.* 23 *Hen.* 8. *c.* 15. *ſect.* 1. and *ſtat.* 4 *Jac.* 1. *c.* 3. *ſect.* 2. but relied chiefly on the *ſtat.* 18 *El. c.* 5. *ſect.* 3. the object of which he inſiſted was, to prevent vexation in common informers; and, therefore, had expreſsly provided, "that where *any* informer on *any* penal ſtatute ſhall be "nonſuit, he ſhall pay to the party defendant his coſts and char-"ges, *&c.*" That nothing could be more vexatious than the preſent action, there being no leſs than ſixteen charges of non-reſidence, in all of which the plaintiff had failed; and alſo a charge of occupying a farm contrary to the ſtatute, in which he had likewiſe failed. That as to the diſtinction taken between a

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common informer, who is entitled only to *half* the penalty, and one who is entitled to the *whole*, no ſuch diſtinction is to be found in the books: But the diſtinction is between a *common informer* and the *party grieved*, the former being liable to coſts, the latter not; and cited 1 *Barnes* 124. *Jeynes qui tam* v. *Stephenſon* *, as in point. That here the plaintiff was not the party grieved, and therefore was liable to coſts.

* *Vide* 2 *Lem.* 116. *Doghead's* caſe.

Mr. *Graham* on the ſame ſide cited *Salk.* 30. *Kirkham* v. *Wheeler*. "Proſecutors *qui tam*, are looked upon as common informers:" and a note at the end of that caſe, in which it is ſaid, that "where a ſtatute gives a penalty to a *ſtranger*, he is a *common informer*, and ſhall pay coſts upon *ſtat.* 18 *El. c.* 5: otherwiſe where the ſtatute gives it to the *party grieved*, for he is not liable to coſts."

Lord *Mansfield*. It is a certain principle that the king himſelf neither pays nor receives coſts in any caſe. But this is not a ſuit proſecuted by the king, though he would have been entitled to a moiety of the penalty if it had been recovered: But it is the ſuit of a common informer. The *ſtat.* 23 *Hen.* 8. *c.* 15. is out of the caſe. But the *ſtat.* 18 *El. c.* 5. is deciſive. In theſe *qui tam* actions, there is liberty given to the informer, by the ſame clauſe of the ſtatute as provides for coſts, to compound for the offence with leave of the court, which ſhews they are common informers. It is an exceedingly plain caſe. I think the plaintiff ought to pay coſts, and alſo the coſts of this motion.

ASTON Juſtice.—There is a caſe of *Greetham verſus* the Inhabitants of the hundred of *Theale*, reported in 3 *Burr.* 1723, the ground of which, after it was decided, ſome of the judges thought the court had quite miſtaken and miſapprehended. Mr. Juſtice *Wilmot* and I thought ſo upon talking it over afterwards, and were for ſetting the matter right, but the coſts were taxed. The miſtake upon which the court went was, that the plaintiff being the *party grieved*, would have been entitled to coſts if he had recovered; and, therefore, having failed, ought to pay coſts to the defendant. But in fact, the plaintiff would not have been entitled to coſts on the *ſtat.* 9 *Geo.* 1. *c.* 22. *ſect.* 7. upon which that action was brought; becauſe it is a ſtatute *ſubſequent* to the ſtatute of *Glouceſter*, which gives coſts only where damages were before recoverable. Now before the *ſtat.* 9 *Geo.* 1. *c.* 22. no damages were recoverable for what is there made the ſubject of an action againſt the hundred; therefore the plaintiff could not have had coſts if he had ſucceeded; and conſequently the defendant

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defendant was not entitled to any under the *ſtat.* 4 *Jac.* 1. *c.* 3. I would not have that caſe therefore, conſidered as a precedent; becauſe the court afterwards found that they had certainly miſapprehended the ground upon which they determined it.

The diſtinction taken in the books is this; whereſoever a ſtatute ſubſequent to the ſtatute of *Glouceſter* increaſes damages to the double or treble value, where damages were *before given*, the plaintiff ſhall recover *coſts*, and thoſe coſts ſhall alſo be doubled or trebled, as the ſtatute may be. But where ſingle, double, or treble damages are *newly given* by ſuch ſubſequent ſtatute, where *no damages were formerly recoverable*, there the plaintiff ſhall recover thoſe damages only, and *no coſts*: becauſe the ſtatute of *Glouceſter* does not operate to add coſts to what is given by ſuch ſubſequent ſtatute. 2 *Inſt.* 289. *Gilb. Hiſt. C. P.* 258, 259. Therefore I am of opinion the rule ought to be diſcharged.

ASHHURST Juſtice. The object of this ſtatute was to prevent vexation in common informers; and therefore, in that reſpect, there is no diſtinction between a common informer *qui tam*, and one who is entitled to the whole penalty; for he may be juſt as vexatious when he proſecutes on behalf of the king and himſelf jointly, as when he ſues on his own ſeparate account.

*Per Cur.* Rule diſcharged.

THE END OF MICHAELMAS TERM.

# HILARY TERM

## 16 GEORGE III. *B. R.* 1776.

### FARREN *qui tam, verſus* WILLIAMS.

*Tueſday, Jan.* 23d.

*Willes* Juſtice abſent. The *Quarter Seſſions* may proceed by *information*, on the *ſtat.* 5 *Eliz. c.* 4, for exerciſing a trade, not having ſerved an apprenticeſhip for ſeven years.

THIS was an information *qui tam* on the ſtatute 5 *El. c.* 4. *ſect.* 39. brought in the court of Quarter Seſſions, in the city of *London*, againſt the defendant, for exerciſing the trade of a tallow chandler, not having ſerved ſeven years apprenticeſhip. It was removed by *certiorari* into this court, and tried before Lord *Mansfield* at the ſittings after *Trinity* Term 1775, when the defendant was found guilty.

Mr. *Dunning* laſt term obtained a rule to ſhew cauſe, why the judgment ſhould not be arreſted for want of juriſdiction in the ſeſſions, upon the authority of the reſolution of *B. R.* upon the ſtat. 21 *Jac. c.* 4. *ſect.* 1. in Sir *Wm. Jones* 193.

Mr. *Wallace*, Mr. *Bearcroft* and Mr. *Buller* now ſhewed cauſe, and inſiſted, that by the ſtatute 5 *El. c.* 4. *ſect.* 39. and ſtat. 31 *El. c.* 5. *ſect.* 7. the quarter ſeſſions had a juriſdiction by information; otherwiſe they could have no juriſdiction at all, for they certainly could not proceed by way of indictment: and cited 1 *Bur.* 543. *Rex* v. *Wright.* 1 *Salk.* 373. *Hob.* 183. 327.—*Cro. Jac.* 75. 178. *Andr.* 216. *Rex* v. *Holmes.*

Mr. *Dunning* for the defendant ſaid, he admitted the courts of *Weſtminſter* could not take cognizance of offences againſt the ſtat. 5 *El. c.* 4. unleſs committed within the county where the courts ſit; and ſo the caſes cited certainly proved, but they proved no more. But what he ſhould contend for was, that the court of Quarter Seſſions had no authority to proceed by information in any caſe, unleſs it was expreſsly given them by ſtatute: And that the ſtatute in this caſe gave no ſuch authority. In ſupport of this general propoſition, he cited 6 *Co.* 19 *b. Gregory* verſus *Blaſhfield*, and *Cro. El.* 737. *Barnaby* v. *Goodale*: Where in error from a judgment in *Bury* upon an information on the ſtat. 5 *El. c.* 4. that point was expreſsly adjudged.

Lord *Mansfield* aſked, if it appeared that the information in that caſe was before the Quarter-Seſſions.

Mr. *Dunning*. It does not expreſsly appear in words, but it could be at no other court: if it had been at the ſeſſions of oyer and terminer, the objection would equally hold.—As to the objection that

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the Quarter Seſſions have no juriſdiction at all, unleſs they can proceed by information, they clearly may proceed by indictment. The modes of proceeding are by *ſtat.* 5 *Eliz. c.* 4. *ſect.* 39. given diſtinctly and ſeparately, *reddendo ſingula ſingulis:* Civil juriſdiction, by ſuit, *&c.* to Courts of civil judicature; criminal juriſdiction, to Courts of criminal judicature; and bill of complaint, to the preſident in council.

Lord MANSFIELD.—The whole queſtion turns upon the 39th ſection of the ſtatute. The words are very much embarraſſed, and the matter does not ſeem to be ſettled by any of the caſes. I wiſh to know the practice; and to inquire of ſome of the old clerks of aſſiſe how the uſage has been at *oyer and terminer.*

Mr. *Wallace* ſaid there had been ſome tried at *Lancaſter.*

ASTON Juſtice.—And elſewhere. I do not think the old caſe of *Gregory* v. *Blaſhfield* in 6 *Co.* 15. is concluſive: And if it has been a practice long received, we ſhould do wrong to overſet it. As to the caſe of *Barnaby* v. *Goodale, Cro. El.* 737. it does not appear that the court at *Bury* was a court of ſeſſions, or of *oyer and terminer. Cur. adviſare vult.*

The next day Lord *Mansfield* mentioned this caſe, and cited an opinion of *Holt* Chief Juſtice when at the bar, out of a note book belonging to the late Mr. *Gill* of *Durham.* The queſtion ſubmitted for *Holt*'s opinion was, "Whether an action could be "brought in the corporation court for exerciſing a trade con-"trary to the ſtat. 5 *El. c.* 4?" and the opinion was as follows; "I conceive an action cannot be brought in the corporation "court: But an information *qui tam* may be brought in the cor-"poration court of ſeſſions. *John Holt.*" His Lordſhip added, that he had mentioned it to ſeveral of the judges, who ſaid it had been cuſtomary on the circuits to try ſuch informations.

Mr. Juſtice *Aſton* ſaid, he had inquired of ſome perſons of great experience in ſeſſions buſineſs; and was informed by them, that it had been uſual to file ſuch informations.

*Per Cur.*—The rule for arreſting the judgment muſt be diſcharged.

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*Wednesday, Jan.* 24th. *Willes* Juſtice abſent. The office of *pariſh clerk* is a *temporal* office; and tho' appointed by the miniſter if removed by him without ſufficient cauſe, a *mandamus* will lie to reſtore him.

## REX *verſus* ERASMUS WARREN Clerk.

MR. *Buller* laſt term ſhewed cauſe againſt a *mandamus* to reſtore *William Readſhaw* to the office of pariſh clerk of *Hampſtead:* He ſtated that the clerk was appointed by the miniſter. That he had ſince become bankrupt, and had not obtained his certificate; that he had been guilty of many omiſſions

in the regiſter; was actually in priſon at the time of his removal, and had appointed a deputy who was totally unfit for the office: And therefore ſubmitted that there was ſufficient cauſe for removing him. 1776. REX *verſus* WARREN.

Mr. *Lucas*, *contra*, inſiſted that the office of pariſh clerk is a *temporal* office *durante vitâ*: That the parſon cannot remove him: and that he has a right to appoint a deputy: And cited 1 *Bur.* 367. 2 *Str.* 942.—1108. 11 *Mod.* 261.

Lord MANSFIELD then ſaid, there was an application of this ſort in a caſe, *Rex* v. *Proctor*. *Mich.* 15 *Geo.* 3. where the parſon removed a pariſh clerk appointed by the former incumbent. There the right of amotion was in queſtion; and all agreed it muſt be ſomewhere, but that caſe was not decided.

ASTON Juſtice.—The court in that caſe recommended it to the miniſter to reſtore him upon his aſking pardon *.

Lord MANSFIELD.—What remedy is there in *Weſtminſter-hall* to remove him? He certainly has his office only *quamdiu bene ſe geſſerit*. But though the miniſter may have a power of removing him on a good and ſufficient cauſe, he can never be the ſole judge and remove him *ab libitum*; without being ſubject to the control of this court.

ASTON Juſtice.—As long as the clerk behaves himſelf well he has a good right and title to continue in his office: Therefore if the clergyman has any juſt cauſe for removing him, he ſhould ſtate it to the court.—Accordingly the court enlarged the rule to this term, that affidavits might be made on both ſides, of the cauſe and manner of amotion. *Adjornatur.*

And now on this day, upon reading the affidavits, Lord *Mansfield* ſaid, it was ſettled in the caſe of *Rex* v. Dr. *Aſhton*, 28 *Geo.* 2. 1754. "That a pariſh clerk is a *temporal* officer, and that the "miniſter muſt ſhew ground for turning him out." Now in this caſe, there is no ſufficient reaſon aſſigned in the affidavits that have been read, upon which the court can exerciſe their judgment; nor is there any inſtance produced of any miſbehaviour of conſequence: therefore the rule for a *mandamus* muſt be abſolute. *Per Cur.* Rule abſolute.

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HAMBLY *et al'*, Aſſignees of MOON *verſus* TROTT Adminiſtrator. *Same day.*

IN *Trover* againſt an adminiſtrator *cum teſtamento annexo*, the declaration laid the converſion by the *teſtator* in his lifetime. Trover does not lie againſt an executor for a converſion by his teſtator.

* I omitted inſerting the caſe of *Rex* verſus *Proctor* in it's place, becauſe it was compromiſed as above; and the Court gave no opinion.

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Plea, that the *teſtator* was *not guilty*. Verdict for the plaintiff.

Mr. *Kerby* had moved in arreſt of judgment upon the ground of this being a perſonal *tort*, which dies with the perſon; upon the authority of *Collins* v. *Fennerell* *, and had a rule to ſhew cauſe.

* *Trin.* 22 & 23 *Geo.* 2. *B. R.*

Mr. *Buller* laſt term ſhewed cauſe.—The objection made to the plaintiff's title to recover in this caſe is founded upon the old maxim of law which ſays, *actio perſonalis moritur cum perſonâ*. But that objection does not hold here; nor is the maxim applicable to all perſonal actions; if it were, neither *debt* nor *aſſumpſit* would lie againſt an executor or adminiſtrator. If it is not applicable to all perſonal actions, there muſt be ſome reſtriction; and the true diſtinction is this: Where the action is founded merely upon an injury done to the perſon, and no property is in queſtion; there, the action dies with the perſon: as in aſſault and battery, and the like. But where property is concerned, as in this caſe, the action remains notwithſtanding the death of the party.

Trover is not like treſpaſs, but lies in a variety of caſes where a party gets the poſſeſſion of goods lawfully. It is founded ſolely in *property*: And the value of the goods only can be recovered. Therefore, the damages are as certain as in any action of *aſſumpſit*. As to the caſe of *Collins* v. *Fennerell* it is a ſingle authority and was not argued; therefore, moſt probably was determined ſimply on the old maxim. But *Savile* 40, caſe 90. is directly the other way.

Where the damages are merely vindictive and uncertain, an action will not lie againſt an executor; but where the action is to recover property, there the damages are certain, and the rule does not hold. This is an action for ſheep, goats, pigs, oats, and cyder converted by injuſtice to the uſe of the perſon deceaſed: Therefore, this action does not die with the perſon.

Mr. *Kerby contra* for the defendant cited, *Palm.* 330. where *Jones* Juſtice ſaid, "that when the act of the teſtator includes "a *tort*, it does not extend to the executor; but being perſonal "dies with him; as *trover* and *converſion* does not lie againſt an "*executor* for trover *fait par luy*." *Collins* v. *Fennerell* above cited.

Here, the goods came to the hands of the teſtator, and he converted them to his own uſe. Trover is an action of *tort*; and converſion is the giſt of the action: No one is anſwerable for a *tort*, but he who commits it; conſequently this action can only be maintained againſt the perſon guilty of ſuch converſion. But here the converſion is laid to be by the teſta-

tor. Therefore the judgment must be arrested. The distinction that has been taken in the books is, that the action may be maintained *by* an executor but not *against* him. *Popham* 31. *Hughes* v. *Robotham* *Popham* 139. *Le Mason* v. *Dixon*. 1776. HAMBLY *versus* TROTT.

Lord MANSFIELD. If this case depends upon the rule, *actio personalis moritur cum personâ*, at present only a *dictum* has been cited in support of the argument. Trover is in form a *tort*, but in substance an action to try property.

Mr. *Kerby*. The executor is answerable for all contracts of the testator, but not for torts.

Lord MANSFIELD. The fundamental point to be considered in this case is, whether if a man gets the property of another into his hands it may be recovered against his executors in the form of an action of trover, where there is an action against the executors in another form. It is merely a distinction whether the relief shall be in this form or that. Suppose the testator had sold the sheep, &c. in question: In that case, an action for money had and received would lie. Suppose the testator had left them in specie to the executors, the conversion must have been laid against the executors. There is no difficulty as to the administration of the assets, because they are not the testator's own property. Suppose the testator had consumed them, and had eaten the sheep; what action would have lain then? Is the executor to get off altogether? I shall be very sorry to decide that trover will not lie, if there is no other remedy for the right.

ASTON Justice. Suppose the executor had had a counter demand against the plaintiff, he could not have set it off in *Trover*: but in an action for money had and received, he might. If these things had been left by the testator in specie, the conversion must have been laid to be by the executor. There seems to be but little difference between actions of trover, and actions for money had and received. As at present advised, I incline to think trover maintainable in this case.

ASHHURST Justice. The maxim does not hold as an universal proposition; because *assumpsit* lies. As to the case of *Collins* v. *Fennerell*, all the court considered it as unargued, and given up rather prematurely by Mr. *Henley*.

Lord MANSFIELD. The criterion I go upon is this: Can justice possibly be done in any other form of action? Trover is merely a substitute of the old action of detinue. 2 *Keb.* 502. *Ventr.* 30. Sir *T. Raym.* 95.——The Court ordered it to stand over.

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Upon a ſecond argument this day, Mr. *Dunning* cited *Cro. Car.* 540—1 *Sid.* 88.

Lord MANSFIELD. Many difficulties ariſe worth conſideration. An action of trover is not now an action *ex maleficio*, though it is ſo in form; but it is founded in property. If the goods of one perſon come to another, the perſon who converts them is anſwerable. In *ſubſtance*, trover is an action of property. If a man receives the property of another, his fortune ought to anſwer it. Suppoſe he dies, are the aſſets to be in no reſpect liable? It will require a good deal of conſideration before we decide that there is no remedy.

ASTON, Juſtice. The rule is, *quod oritur ex delicto, non ex contractu*, ſhall not charge an executor. 2 *Bac. Abr.* 444, 445. *tit. Executors and adminiſtrators.* 5 *Bac. Abr.* 28c. *tit. Trover.* Where goods come to the hands of the executor in *ſpecie*, *trover* will lie; where in *value*, an action for *money had and received.* But the difficulty with me is, that here it does not appear whether the goods came to the hands of the defendant in ſpecie or in value.

*Cur. adviſare vult.*

Afterwards, on *Monday*, *February* 12th, in this term, Lord *Mansfield* delivered the unanimous opinion of the court as follows:

This was an action of trover againſt an adminiſtrator, with the will annexed. The *trover* and *converſion* were both charged to have been committed by the teſtator in his life-time: The plea pleaded was, that the *teſtator* was *not guilty*. A verdict was found for the plaintiffs, and a motion has been made in arreſt of judgment, becauſe this is a *tort*, for which an executor or adminiſtrator is not liable to anſwer.

The maxim, *actio perſonalis moritur cum perſonâ*, upon which the objection is founded, not being generally true, and much leſs univerſally ſo, leaves the law undefined as to the kind of perſonal actions which die with the perſon, or ſurvive againſt the executor.

An action of trover being in *form* a *fiction*, and in *ſubſtance* founded on *property*, for the equitable purpoſe of recovering the value of the plaintiff's ſpecific property, uſed and enjoyed by the defendant; if no other action could be brought againſt the executor, it ſeems unjuſt and inconvenient, that the teſtator's aſſets ſhould not be liable for the value of what belonged to another man, which the teſtator had reaped the benefit of.

We

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We therefore thought the matter well deſerved conſideration: We have carefully looked into all the caſes upon the ſubject. To ſtate and go through them all would be tedious, and tend rather to confound than elucidate. Upon the whole, I think theſe concluſions may be drawn from them.

*Firſt*, as to actions which ſurvive againſt an executor, or die with the perſon, on account of the *cauſe* of *action*. *Secondly*, as to actions which ſurvive againſt an executor, or die with the perſon, on account of the *form* of *action*.

As to the *firſt*; where the cauſe of action is money due, or a contract to be performed, gain or acquiſition of the teſtator, by the work and labour, or property of another, or a promiſe of the teſtator expreſs or implied; where theſe are the cauſes of action, the action ſurvives againſt the executor. But where the cauſe of action is a *tort*, or ariſes *ex delicto* (as is ſaid in Sir *T. Raym.* 57, *Hole* v. *Blandford*,) ſuppoſed to be *by force* and *againſt the King's peace*, there the action dies; as battery, falſe impriſonment, treſpaſs, words, nuiſance, obſtructing lights, diverting a water courſe, eſcape againſt the ſheriff, and many other caſes of the like kind.

Where the cauſe of action is money due, or a contract to be performed, gain or acquiſition by the labour or property of another, or a promiſe by the teſtator expreſſed or implied, the action ſurvives againſt the executor. Otherwiſe, if it be a *tort*, or ariſe *ex delicto*, ſuppoſed to be by *force*, and *againſt the peace*.

*Secondly*, as to thoſe which ſurvive or die, in reſpect of the *form of action*. In ſome actions the defendant could have waged his law; and therefore, no action in that form lies againſt an executor. But now, other actions are ſubſtituted in their room upon the very ſame cauſe, which do ſurvive and lie againſt the executor.—No action where in form the declaration muſt be *quare vi et armis*, *et contra pacem*, or where the plea muſt be, as in this caſe, that the *teſtator* was *not guilty*, can lie againſt the *executor*. Upon the face of the record, the cauſe of action ariſes *ex delicto*; and all private criminal injuries or wrongs, as well as all public crimes, are buried with the offender.

But in moſt, if not in all the caſes, where trover lies againſt the teſtator, another action might be brought againſt the executor, which would anſwer the purpoſe.—An action on the cuſtom of the realm againſt a common carrier, is for a *tort* and ſuppoſed crime: The plea is *not guilty*; therefore, it will not lie againſt an executor. But *aſſumpſit*, which is another action for the ſame cauſe, will lie.—So if a man take a horſe from another, and bring him back again; an action of treſpaſs will not lie againſt his executor, though it would againſt him; but an action for the uſe and hire of the horſe will lie againſt the executor.

There is a caſe in Sir *Thomas Raymond*, 71*, which ſets this matter in a clear light: There, in an action upon the caſe, the plaintiff

* *Bailey* v. *Birtles* et uxor': executrix of *Richard Baily*.

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tiff declared, "that he was poſſeſſed of a *cow*, which he *delivered* to the teſtator, *Richard Bailey*, in his lifetime, to *keep* the ſame for the uſe of him the *plaintiff*; which cow the ſaid *Richard* afterwards *ſold*, and did *convert* and diſpoſe of *the money to his own uſe*; and that neither the ſaid *Richard*, in his life, nor the defendant after his death, ever paid the ſaid money." Upon this ſtate of the caſe, no one can doubt but the *executor* was liable for the *value*. But the ſpecial injury charged, obliged him to lead, that the *teſtator* was *not guilty*. The jury found him guilty. It was moved in arreſt of judgment, becauſe this is a *tort* for which the executor is not liable to anſwer, but *moritur cum perſonâ*. For the plaintiff it was inſiſted, that though an executor is not chargeable for a *mis-feaſance*, yet for a *non-feaſance* he is: as for non-payment of money levied upon a *fieri facias*, and cited *Cro. Car.* 539. 9 *Co.* 50.[b]. where this very difference was agreed; for non-feaſance ſhall never be *vi et armis*, nor *contra pacem*: But notwithſtanding this the court held "it was a *tort*, and that the executor ought not to "be chargeable." Sir *Thomas Raymond* adds, "*vide Saville* 40. "a difference taken." That was the caſe of Sir *Henry Sherrington*, who had cut down trees upon the Queen's land, and converted them to his own uſe in his life-time. Upon an information againſt his widow, after his deceaſe, *Manwood*, Juſtice, ſaid, "In "every caſe where any price or value is ſet upon the thing in "which the offence is committed, if the defendant dies, his exe- "cutor ſhall be chargeable; but where the action is for damages "only, in ſatisfaction of the injury done, there his executor ſhall "not be liable." Theſe are the words Sir *Thomas Raymond* refers to.

Here therefore is a fundamental diſtinction. If it is a ſort of injury by which the offender acquires no gain to himſelf at the expence of the ſufferer, as beating or impriſoning a man, &c. there, the perſon injured has only a reparation for the *delictum* in damages to be aſſeſſed by a jury. But where, beſides the crime, property is acquired which benefits the teſtator, there an action for the value of the property ſhall ſurvive againſt the executor. As for inſtance, the executor ſhall not be chargeable for the injury done by his teſtator in cutting down another man's trees, but for the benefit ariſing to his teſtator for the value or ſale of the trees he ſhall.

So far as the tort itſelf goes, an executor ſhall not be liable; and therefore it is, that all public and all private crimes die with the offender, and the executor is not chargeable; but ſo far as the act

act of the offender is beneficial, his affets ought to be anſwerable; and his executor therefore ſhall be charged. 1776.

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There are expreſs authorities, that trover and converſion does not lie againſt the executor: I mean, where the converſion is by the teſtator. Sir *William Jones*, 173—4, *Palmer*, 330. There is no ſaying that it does.

The form of the plea is deciſive, *viz.* that the *teſtator* was *not guilty*; and the iſſue is to try the guilt of the teſtator. And no miſchief is done; for ſo far as the cauſe of action does not ariſe *ex delicto*, or *ex maleficio* of the teſtator, but is founded in a duty, which the teſtator owes the plaintiff; upon principles of civil obligation, another form of action may be brought, as an *action for money had and received*. Therefore, we are all of opinion that the judgment muſt be arreſted.

*Per Cur.* Judgment arreſted.

REX *verſus* Doctor WINDHAM, Warden of Wadham College. *Thurſday, Jan.* 25th.

LORD MANSFIELD.—This is an application, by the majority of the Fellows of *Wadham* college to this court, for a *mandamus* to be directed to the warden of the college, to compel him to affix the common ſeal of the college to an anſwer of the ſub-warden, burſars, dean and principal officers of the college, to a bill filed in the Court of Chancery by *Thomas Lloyd* againſt the warden, fellows, and ſcholars. The object of the bill is to compel the execution of a leaſe according to an agreement alleged to have been made by the college, but which the fellows now inſiſt was not made by a majority of them, as it ought to have been. The warden diſapproves of the anſwer of the fellows, and therefore has refuſed to put the ſeal of the college to it.

*Mandamus* granted to compel the warden of *Wadham* college to affix the common ſeal of the college to an anſwer of the fellows, *&c.* in Chancery, contrary to his own ſeparate anſwer put in.

The ground on which the application has been made is, that there is no other remedy by which the end can be ſpecifically obtained.

In the Court of Chancery, when a bill is brought againſt a corporation, if the corporation is in contempt, there is no remedy by way of proceeding for a contempt *perſonally* againſt the real parties who offend; but the mode of compulſion is by ſequeſtration. In that caſe, the plaintiff is to proceed to take poſſeſſion of all the perſonal eſtate of the college; and if that will not make the members agree, he is to take poſſeſſion by ſequeſtrators of all the

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the rents and profits of their real eſtate. This mode of proceeding would affect the whole body, and puniſh the corporation at large. But the corporation at large is not in fault here; the majority of the body have obeyed the proceſs of the court of Chancery, as far as in their power lies, and are ready to put in their anſwer. But an individual, the warden, whoſe act is neceſſary to render that anſwer complete, lies by, and refuſes to put the ſeal of the college to it. I believe it is the firſt inſtance of the kind; and the Court of Chancery has ſtaid its proceſs for the contempt, in mercy to the acquieſcing parties, that the preſent application might be made.

Mr. *Kenyon* has ſaid very truly, that where there is no other legal ſpecific remedy to attain the ends of juſtice, the courſe muſt be by *mandamus*, which is a prerogative writ; and the very form of it, ſhews its object is to prevent a defect of juſtice. Thus it comes recommended by the Court of Chancery to have it ſpecifically done. But further, the parties out of caution have applied likewiſe to the viſitor. He acquieſces in the application to this court for a *mandamus*, and very rightly. For who could ever entertain a thought or idea of this being a diſpute proper for the viſitor to decide. It is not a private diſpute; but a ſuit by a third perſon againſt the whole body, for the ſpecific performance of an agreement. An application to the viſitor in ſuch a caſe is nugatory; for he cannot compel a ſpecific performance. But the court, if they have juriſdiction of the cauſe, will enforce it by their own means.

So where an eſtate is in the college, that is, in the whole body, and they are to act in a truſt; the viſitor cannot meddle in a matter which is the proper ſubject of ſuch truſt. *Green* v. *Rutherforth* before Lord *Hardwicke* aſſiſted by Sir *John Strange*, 1 *Vez.* 462.

Then, is it new in principle to apply for a *mandamus*, to have a corporation ſeal put to an inſtrument? Certainly not. The caſe of the *Lord High Steward* of the Univerſity of *Cambridge** is an authority upon the ſubject. Here, the application is for a *mandamus*, to compel the warden to put the ſeal to an anſwer. If the parties have a right, we ſhall ſtop all proceedings by refuſing it, for the Court of Chancery cannot proceed without the ſeal is put.

* 1 *Black. Rep.* 547.

Doctor *Windham* ſeems to have miſconceived the conſequence of his affixing the ſeal to the anſwer of the fellows, and to think it will make his corporate anſwer inconſiſtent with his private ſeparate anſwer; for he is of opinion the plaintiff's ſuit is juſt, and that

that the agreement ought to be executed. But his putting the college ſeal does not contradict his private ſeparate anſwer: And by refuſing to put it, he defeats the end he wiſhes to obtain. 1776.

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As to the ſtatute concerning the college ſeal being put, Dr. *Windham* contends for a negative; and that the warden muſt be one. The words of the ſtatute are theſe: "Hoc etiam volo, "ut ſolicitudine cautum ſit, ut nihil ſigilletur, quod non per "GARDIANUM et *majorem partem* ſociorum mature deliberatum "concordatur, et per EOSDEM comprobatur." I am clear theſe words do not give the warden a negative. Warden and fellows are a deſcription of the corporation; and the expreſſion "per "eoſdem," without any repetition of the word *gardianum* muſt mean the major part of the body. Therefore I am of opinion a *mandamus* ought to go.

The three other judges concurred.

*Per Cur.* Rule for a *mandamus* abſolute.

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## DRIVER *ex dim.* EDGAR *verſus* EDGAR.

*Friday, Jan.* 26th.

IN ejectment, upon not guilty pleaded, a verdict was found for the plaintiff, ſubject to the opinion of the court upon the following caſe.

One deviſes to his daughter an *expreſs eſtate tail*; but afterwards ſays, ſuch deviſe ſhall be *void* as to *inheritance* of *heirs* if *ſhe die without iſſue*, and then the eſtate ſhall deſcend to his heir male. A common recovery ſuffered by tenant in tail in her life-time is good, though ſhe afterwards die without iſſue.

*Devereux Edgar*, being ſeiſed of the premiſes in queſtion, duly made his laſt will, and among other things deviſed as follows: "I give and bequeath unto my daughter *Temperance Edgar*, all that my farm or eſtate called the *Breed* farm, *&c.* to hold the ſame, from and after the death of my wife, to the ſaid *Temperance* my daughter, and to the *heirs of her body* lawfully begotten, and for *want of ſuch heirs*, to my right heirs for ever. *Item*, I give and bequeath unto my daughter *Mary Edgar*, all that my farm, *&c.* to have and to hold all the ſaid premiſes, to the ſaid *Mary* my daughter, and the heirs of her body lawfully to be begotten immediately after the deceaſe of my wife. Alſo I give to my ſaid daughter *Mary Edgar*, all that my farm, *&c.* to have and to hold the ſaid laſt mentioned farm and premiſes, from and immediately after my dear wife her mother's deceaſe, to the ſaid *Mary*, and to the heirs of her body lawfully to be begotten. And herein my mind and will is further declared, that in caſe either of my ſaid daughters, *Temperance* or *Mary*, ſhall happen to

*die*

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*die* or depart this life, ſingle, married, or widows, *not leaving children* or *child* living at their deceaſe legally begotten, that then her gift, legacy or bequeſt herein, or eſtate given her by this my will, ſhall be entirely *void*, as to *inheritance of heirs*, and of none effect: and the eſtate ſo given her, ſo dying without heirs of her body, ſhall deſcend and go to my heir male, and his heirs male; and he and they, ſo inheriting the ſaid bequeathed eſtate, ſhall pay or cauſe to be paid to the ſurviving ſiſter my daughter, the ſum of thirty pounds yearly, during her natural life; free of all taxes and deductions whatſoever.

The ſaid *Devereux Edgar* died ſo ſeiſed as aforeſaid, leaving the ſaid *Temperance* his wife, ſince deceaſed, *Robert Edgar* ſince deceaſed, father of the leſſor of the plaintiff, his eldeſt ſon, *Devereux Edgar*, his ſecond ſon, and two daughters, *Temperance Edgar*, one of the deviſees, who died unmarried, and *Mary Edgar* the other deviſee. In *Hilary* Term 1774, *Mary Edgar* ſuffered a common *recovery* of the premiſes in queſtion, the uſes of which recovery were to *herſelf* in *fee*; and afterwards made her will, by which ſhe deviſed part of the premiſes in queſtion to her niece *Mary Edgar* in fee, and the remaining part to her nephew *Devereux Edgar*, the defendant in fee; and ſoon after died *unmarried*, without having revoked the ſame.

The queſtion reſerved for the opinion of the court was, Whether the recovery ſuffered by *Mary Edgar*, was ſufficient to bar the ſeveral eſtates claimed by the leſſor of the plaintiff?

This caſe was argued twice; firſt, in laſt term by Mr. *Wilſon* for the plaintiff, and Mr. *Davenport* for the defendant; and now in this term by Mr. *Manſfield* for the plaintiff, and Mr. *Wallace* for the defendant.—On the firſt argument, Lord *Manſfield* ſaid, he had not any doubt himſelf at that time, but wiſhed to look into a caſe or two. The next day, Lord *Manſfield* directed this cauſe to ſtand over for further argument, and ſaid, the firſt point is, Whether *Mary*, the daughter, had not neceſſarily an eſtate tail to the hour of her death: if ſhe had not, the deviſe to the heirs of her body muſt be a contingent remainder to them, as purchaſors. If ſo, the next remainder to the heirs male of the teſtator muſt be void; for there cannot be a contingent remainder limited upon a contingent remainder. The next point is, Whether it is poſſible for heirs of the body to take as purchaſors at all. Upon looking into the caſes, I have found one which is very like the preſent, in 2 *Bac. Abr.* 59, 60. *Fountaine* v. *Gooch*. The only difference

difference between that case and this is, that there, the estate is given over upon an indefinite failure of issue at her death. 1776.

In this case, if it was only an estate for life in the daughter, such life estate must be forfeited by the common recovery. DRIVER *versus* EDGAR.

For the plaintiff it was now insisted, that upon the whole of this will, the intention of the testator was not to give his daughter an *immediate estate tail*, which would have entitled her to suffer a recovery; but to give her an estate *for life only*, with a remainder in tail to her children, provided she had any living at her death; and if none, then to give the estate over to the testator's own heir male, with remainder to his heirs male. For by the subsequent clause, "in case, *&c.*" it is plain that he considered the words "heirs of her body" and children, as synonimous terms: But even if he did not, in providing for the event which has happened of the devisee dying without heirs of her body, he expressly revokes that estate of inheritance. This was manifestly the testator's intention, and therefore the court will give effect to it.

For the defendants, *contra*, it was argued, that by the words "heirs of her body," *Mary* the daughter clearly took an *estate tail* in the first instance; and that even supposing the testator to have used the words heirs of her body and children, as synonimous terms, yet the recovery was well suffered: For a devise to *A.* and her children, she having none born at the time of the devise, is a good estate tail. 6 *Co.* 17. *b.* If so, the devise over cannot be an executory devise; for there can be no executory devise after an estate tail: Consequently, if it can take place as a contingent remainder, it shall: and the rule of construction has always been so; that is to say, wherever a contingency is limited to depend upon an estate of freehold which is capable to support a remainder, it shall always be held a contingent remainder, and not an executory devise. 2 *Saund.* 388. *Purefoy* v. *Rogers.* 1 Lord *Raym.* 208. in the case of *Luddington* v. *Kime.* This is such an estate of freehold in the daughter, as will support a remainder; and therefore by the recovery that remainder is barred.—On the second argument Mr. *Wallace* urged the case of *Fountaine* v. *Gooch*, 2 *Bac. Abr.* 59. 60. as expressly in point.

Lord *Mansfield* after stating the case said, the validity of the recovery suffered by *Mary*, depends upon whether she was tenant in tail of that estate, or tenant for life only: And it is necessary for the plaintiff to support, that at the death of the testator, she was (during her own life,) tenant for life only. Now the estate

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eſtate is given to her and the *heirs of her body*, which is an eſtate tail: Nevertheleſs, the intention of the teſtator may reſtrain that eſtate of inheritance, and confine it to an eſtate for life only. It is inſiſted that it was the intention of the teſtator, that the eſtate of inheritance ſhould be reſtrained: but, has the teſtator ſaid it ſhould be ſo during her life? No; he has only reſtrained it upon future contingencies. The firſt is, the event of her own death; but 'till that contingency happens the inheritance is in her. The ſecond is, upon her leaving no children.

If ſhe was only tenant for life under this deviſe, there is an end of the title upon the ſecond limitation: Becauſe, in that caſe, it is a limitation upon a contingent remainder which is void.

Further, ſuppoſing her tenant for life only, by ſuffering this common recovery, ſhe has committed a forfeiture. Who is to enter? The next heir male. Suppoſe ſhe had lived and had a ſon afterwards: the next heir male muſt take place, contrary to the clear intention of the teſtator in that caſe.

It is manifeſt that the intention of the teſtator was to prevent a common recovery being ſuffered. But where a teſtator intends that which by law he cannot do, the law will not allow his intention to take effect. If, therefore, ſhe was tenant in tail to the hour of her death, nothing is ſo clear, as that all conditions, limited upon ſuch eſtate tail, are avoided by the common recovery which has been ſuffered. And we are of opinion that *Mary* had an eſtate tail.

*Per Cur.* Judgment for the defendant.

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*Thurſday, Feb.* 2ıſt.

## ATCHESON *verſus* EVERITT.

*A Quaker's teſtimony on affirmation, is admiſſible in an action of debt on ſtat. 2 Geo. 2. c. 24 againſt bribery.*

THIS was an action of debt upon the ſtat. 2 *Geo.* 2. *c.* 24. *ſect.* 7. againſt bribery. Plea, Not guilty. Verdict for the plaintiff.

On behalf of the defendant, it was moved laſt term, that there might be a new trial; becauſe a *quaker* had been received as a witneſs on his *affirmation*; and it was objected, that this being a *criminal cauſe*, his evidence ought not to have been received.

It was argued laſt term by Mr. *Dunning*, Mr. *Popham*, Mr. *Rooke* and Mr. *Buller* for the plaintiff; and by Mr. *Manſfield* and Mr. *Morris* for the defendant.

Lord *Manſfield* then ſaid, This queſtion is very important, both as to all the Quakers in the kingdom, and to the general adminiſtration

ſtration of juſtice. I wiſh, when the ſtat. 7 & 8 *Wm.* 3. *c.* 34. was made, that the affirmation of a Quaker had been put on the ſame footing as an oath, in all caſes whatſoever: And I ſee no reaſon againſt it; for the puniſhment of the breach of it is the ſame. But even the indulgence they enjoy under this ſtatute, was obtained with much difficulty and ſtruggle. The legiſlature formerly looked upon non-conformiſts as criminal; and Quakers in particular, as obſtinate offenders. This only ſerved to increaſe their number: If they had been let alone, perhaps they would not have come down to theſe times. The more generous and liberal notions of the preſent times do not look upon real ſcruples in the light of an offence. The ſtatute 7 & 8 *Wm.* 3. *c.* 34. is, *primâ facie*, made in caſe of Quakers. Indeed, even at that time, they were ſafe where the Attorney-General could controul; but they wanted to be ſecure from the perſecution of private individuals. In this act, however, there is an exception to their being admitted as witneſſes in *criminal cauſes*, and ſerving on juries. The queſtion therefore is, What the ſtatute means by the words "*criminal cauſes?*" Diligent ſearch has been made by Sir *James Burrow*, and more ſo by my brother *Aſton*, for precedents: and I believe they have furniſhed all the caſes that are to be found. The reſult of thoſe caſes is, that the courts of late years have, in favour of the Quakers, relaxed their former ſeverity. Their affirmation has been received in the caſe of an appointment of overſeers. 2 *Str.* 1,219. So in the caſe of an attachment againſt a Quaker himſelf.

No caſe has been found in which it has been refuſed, where the action, though in *form* a *criminal* action, in *ſubſtance* is a mere action between *party* and *party*. I thought there was one upon the ſtatute of hue and cry, 27 *El. c.* 13. but the ground upon which it was refuſed in that caſe was, that the Quaker could not lay a foundation for the action without an *affidavit*. *Vide ſect.* 11.

In caſes, where an action and an indictment both lie for the ſame act; as in aſſault, impriſonment, fraud, *&c.* a Quaker is an admiſſible witneſs in the action, though not on the indictment.

There being no caſe in point, it is a material circumſtance, that actions for *penalties*, are to a variety of purpoſes conſidered as *civil ſuits*. They may be amended at common law. To be ſure, the action in this caſe is not only given to recover a penalty, but it is attended likewiſe with *diſabilities*. Therefore, it partakes much of the nature of a criminal cauſe. Moreover, the offence itſelf is not merely *malum prohibitum*, by ſtatute, but it

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was indictable at common law. Upon general principles, I think the affirmation of a Quaker ought to be admitted in all caſes, as well as the oath of a Jew, or a Gentoo, or of any other perſon who thinks himſelf really bound by the mode and form in which he atteſts. But how the law is in reſpect of this particular caſe, I am at preſent not at all decided in my opinion.

ASTON, Juſtice.—This action certainly partakes of a *criminal nature*. The crime itſelf was puniſhable at common law; and that puniſhment is now increaſed by additional penalties and diſabilities. I think an affirmation ought really to be put upon the ſame footing as an oath. But at preſent there is no authority to decide that this is a caſe in which it can be ſo, by law. Therefore I am for time to adviſe. The court, next day, ordered this cauſe and another, *viz. Atcheſon* v. *Gough*, which depended preciſely upon the ſame queſtion, to ſtand over 'till this term.

Mr. *Morris* now argued for the defendant. It will be contended that a *Quaker's affirmation* ought in *all* caſes to be received, where the *oath* of another man is received. We are not now in the caſe of a man who, in conformity to the ceremonies of his own religion, refuſes to take the *general oath* preſcribed by *law*: But this is the caſe of a perſon who refuſes to take *any oath* at all.

Till the ſtatute 7 & 8 *Wm.* 3. there was no doubt about not receiving a Quaker's affirmation. But that ſtatute, in compliance with the prejudices of this ſect, broke in upon the rule of the common law, partly in favour to them, and partly for the general benefit of the ſubject. At the ſame time the legiſlature drew the line, by providing "that nothing ſhould enable the af-"firmation of a Quaker to be received in any *criminal cauſe*:" and another ſtat. 22 *Geo.* 2. *c.* 30. *ſect* 3. ſays, "in any *criminal* "*caſe*." But the court has already decided that *cauſe* and *caſe* are the ſame. The queſtion therefore is, Whether the preſent is a *criminal caſe* or not? Crimes and puniſhments are neceſſary attendants on each other. Puniſhment is a legal term, and is underſtood to be in conſequence of ſome offence. The charge againſt the defendant is a charge of bribery. The ſtatutes upon which the action is brought, treats bribery as an *offence*, throughout, and the perſon committing it is an *offender*. Conſequently it conſiders bribery as a crime. It will be ſaid, on the contrary, that this action to recover the penalty preſcribed by the ſtatute, is merely a civil action. That is not ſo. For bribery was a crime at common law: and the penalty given by the ſtatute is only part of the fine due at common law to the pub-

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lic in ſatisfaction of the offence: beſides which, the ſtatute inflicts additional pains and penalties which are alſo incurred by the judgment. 1776. ATCHESON verſus EVERITT.

*Secondly.* To conſider this caſe upon the ſtatutes of *jeofails*. Though the proceedings in a civil action are amendable at common law, yet this caſe, more than any other penal action, is not within the ſtatute of jeofails: And cited *Moore* verſus *Huſſey*. *Hob.* 101. where in an action on ſtat. *Weſtminſter* 2. *c.* 35. the Court of *King's Bench* held "that the puniſhment of two years "impriſonment made it a penal action;" and therefore reverſed the judgment given in the *Common Pleas* in that caſe for the plaintiff, "becauſe there were no *plegii de proſequendo* entered."

*Thirdly:* Upon authorities. A Quaker's teſtimony is not admiſſible upon a rule for an information. 2 *Strange* 872. Nor upon rules to anſwer the matters of an affidavit. 2 *Str.* 946.

With reſpect to indictments and all proſecutions, which upon the face of them are manifeſtly criminal ſuits, there can be no diſpute. The queſtion therefore is, Whether it is the *form* alone, or the *ſubſtance*, that conſtitutes a *criminal action?* There are two caſes to this purpoſe: 2 *Str.* 1,219. where a rule for quaſhing an appointment of overſeers was held to be a civil action, and a Quaker's affirmation of ſervice of the rule admitted accordingly. But in 2 *Str.* 856. which was the caſe of an appeal of murder, though the appellant had a right to releaſe the appellee in every ſtage of the cauſe, a Quaker's evidence was rejected, becauſe in ſubſtance it was a criminal proſecution. And it matters not whether the offence is of the greateſt or leaſt magnitude: If the *end* of the action is *merely damages*, a Quaker's affirmation is admiſſible: But wherever the end is puniſhment, as in this caſe, it is not. As to the caſe of *Rex* verſus *Bell*, *Andrews* 200. and *Rex* verſus *Chamberlayne* there cited, they neither of them came up to this caſe. Here the penalty is not given as damages, but as part of the puniſhment: But if it were, ſtill this is a criminal action in reſpect of the additional pains and diſabilities incurred by the judgment. And this is an anſwer to the objection, that if the party were arreſted and impriſoned for the penalty, ſo much does the action partake of a civil ſuit, that the defendant might be diſcharged under an act of inſolvency: But ſuppoſing he could be ſo diſcharged, the inſolvent act could not remove the further pains and diſabilities.

Therefore, both upon the reaſon of the thing, and the authorities in the books, this is a *criminal* action, and conſequently a Quaker's affirmation is not admiſſible.

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Mr. *Rooke contra* for the plaintiff. The inclination of the court will be to receive this teſtimony: The Quakers' objection to taking an oath is founded on real ſcruples of conſcience; why ſhould not their religious prejudices be indulged as well as thoſe of a *Jew* or a *Mahometan*; yet the teſtimony of theſe laſt is received even in criminal caſes. I do not contend, that a Quaker's teſtimony can be received in this country in criminal caſes; but I contend that *this* is not a criminal caſe; and that in all caſes which are not ſtrictly criminal, our magiſtrates will be inclined to receive it. The queſtion muſt be decided by the words of the ſtatute 7 & 8 *W.* 3. *c.* 34. The preamble is, "to relieve Quakers "from proſecutions of contempt for not taking oaths when law-"fully required." The ſtatute allows them to make affirmation inſtead of taking an oath; but it provides, that their affirmation ſhall not be received in *criminal cauſes*. The general object of the ſtatute ſeems to have been, to take theſe ſectaries out of the hands of private ſubjects, and to leave them wholly to the diſcretion of the crown. In civil ſuits, the ſubject may ſue out an attachment of contempt, or may bring an action againſt any one who refuſes to obey a *ſubpœna*; but where the King's name is uſed, the Attorney-General can ſtop the proſecution. In this caſe, therefore, I am rather of counſel for the whole body of Quakers, than for the plaintiff in the preſent action; for, if their affirmation is not admiſſible, they are, in ſuch caſes as the preſent, open to all the perſecution they ſuffered before the ſtat. 7 & 8 *Wm.* 3. *c.* 34. was made for their relief.

The great queſtion is, Is this a criminal cauſe? The criterion of diſtinction between a criminal and a civil cauſe is, the *form* of the proceeding, not the offence which occaſions it. An aſſault and nuiſance may be proſecuted either by action or by indictment; in the one caſe, a quaker's affirmation may be received; in the other, not. The offence of bribery may be proſecuted either by action or indictment. The plaintiff has choſen to proſecute by action, and in ſo doing he has proceeded civilly, not criminally. This cauſe is in its form an action of debt for a ſpecial cauſe, at the ſuit of a private ſubject. The plaintiff does not ſue *tam pro rege quam pro ſeipſo*: He ſues in his own name only, and recovers the whole penalty. The declaration ſtates, that the defendant owes the money; and that though often requeſted, he refuſes to pay. The ground of complaint is, the non-payment of a debt. The action is founded upon that implied contract, which every ſubject enters into with the ſtate to obſerve its laws. 3 *Black. Com.*

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*Com.* 158. The plea is, *nil debet*; not that the defendant is not guilty. The judgment is to recover the debt; and the party imprisoned for non-payment may have the benefit of the insolvent act. Thus far, then, the whole is merely a civil proceeding. But it is said, there is a disability incurred by the judgment, and therefore it is a *criminal proceeding*. To this it may be answered, that the disability is no part of the judgment, but only a consequence of it: That the form of the proceeding is not affected by it; that the being restrained from suing for a debt beyond time of limitation, is as much a disability, as the being restrained from voting; yet there is no doubt but that a Quaker may give evidence to prove a debt to be above six years' standing. The legislature could not mean to exclude a Quaker's testimony in such a case; for then the offence might frequently be committed with impunity. A Quaker may vote; must affirm against bribery: He may be solicited, bribed, and prosecuted for perjury. Ought not all these statutes to be taken *in pari materia*? If by his affirmation he can claim to vote, and clear himself from the imputation of bribery, ought he not to be trusted as a credible witness to prove bribery in others?

As to authorities, there are none which say that this testimony ought not to be received, in a case like the present. The case of the *King* against *Bell*, *Andr.* 200, and the cases there cited, are none of them in point against us; and they shew the strong inclination of Lord *Hardwicke*'s mind to receive the affidavits which were objected to. But the case of *Middleton* against Sir *Watkyn Williams Wynne*, is in point to shew that this is not a criminal cause. That was an action brought by Sir *Watkyn* against Mr. *Middleton* on the *stat.* 7 and 8 *Wm.* 3. *c.* 7. for double damages for a false return. Sir *W.* had a verdict and judgment. Mr. *Middleton* brought error; and one error assigned was, that the judgment concludes the defendant is *in misericordia*, instead of awarding a *capiatur*. And that this being an action on a *penal statute*, was not aided by the statute of *jeofails*. Lord Chief Justice *Willes*, in delivering the opinion of the judges in the Exchequer chamber, says, "they are not agreed whether the judgment is right or "wrong, but they are all agreed, that if it is wrong, it is aided "by the statutes of *jeofails*. It is true, the statute 4 *G.* 2. *c.* 26. "excepts criminal cases from the statutes of *jeofails*; but whether "this statute 7 and 8 *W.* 3. be penal or remedial, as this is *not* a "*criminal prosecution*, the objection is aided." This is in point to shew the present is not a criminal prosecution; therefore, the evidence was properly received.

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Lord MANSFIELD.—When this case was argued before, I was desirous, for many reasons, that the question should be very fully considered, all the cases looked into, and solemnly argued again. I think it of the utmost importance, that all the consequences of the act of toleration should be pursued with the greatest liberality, in case of the scrupulous consciences of dissenters on the one hand; but so as those scruples of conscience should not be prejudicial to the rest of the king's subjects. For a scruple of conscience entitles a party to indulgence and protection, so far as not to suffer for it; but it is of consequence that the subject should not suffer too.

I have been furnished with a great number of cases, which have passed in this court, upon motions for attachments and other collateral matters, where the affirmations of Quakers have been refused. But these seem all to have arisen from the hasty decision of a case of *Hinton* v. *Byron**, 11 *Wm.* 3. (cited in *Rex* versus *Bell*, where, on a motion for an attachment, the affidavit in support of the application, was by a Quaker on his affirmation. Barely upon that, the attachment was objected to, and not a word was said in support of it: but for a good reason:—The moment the objection was made, the Quaker took the oath, or was ready to have taken it, and so the objection was not insisted on. And yet, it is remarkable, that the memory of these cases has run through all the rest, introduced very great confusion, and not one of the authorities seems to have been argued or considered upon the act of parliament itself. But the present is not a case of that sort. This is the case of evidence offered at a trial in open court.

This sect sprung up during the troubles, and was found at the restoration, with many other sects of non-conformists equally scrupulous. At that time, the law considered their scruples of conscience as a crime; and therefore, they were not allowed to be set up as an excuse or justification of another offence. Therefore, when a Quaker, who was subpœnaed to give evidence, absented himself, and an attachment issued in consequence of it, he could not in excuse say, that his conscience prevented him from giving evidence; for that was a crime. So in the case of interrogatories. The consequence was, he was obliged to answer, or be committed to prison; and if his obstinacy continued, he lay there for life.

The experience of eight-and-twenty years from the restoration to the time of the revolution, shewed that this obstinacy was not

* The case of *Hinton* v. *Byron* is not mentioned in the printed report of *Rex* v. *Bell*, *Andrews*, 207.

merely

merely a pretence or colour given to right and wrong; but that it was a SCRUPLE, and that the ſect was ready to go through all kind of ſuffering in the pertinacious adherence to it. 1776.

ATCHESON verſus EVERITT.

A more liberal way of thinking prevailed after the revolution*. The principles of toleration were explained and juſtified in conſequence of the writings of Mr. *Locke*, Lord *Somers*, and other great men of thoſe times: And a ſtatute paſſed, which, though not general, was very extenſive in the relief it afforded to ſcrupulous conſciences. That ſtatute was 1 *Wm. & Mar. c.* 18. commonly called the *Toleration Act*.

* 2 *Vezey*, 273. 276.

In the *tenth* ſection of that ſtatute, the legiſlature takes notice that there was a ſect called *Quakers*, who had religious principles, in which they differed from the eſtabliſhed doctrine of the church of *England*; and that one of their religious ſcruples was, the taking an oath according to the form preſcribed by the law of *England* to Chriſtians: and therefore, the act enables them to give aſſurance of their fidelity and allegiance to the ſtate, by what I may call *another form* of *oath*; becauſe it is appealing to the Deity for the veracity of what they ſhall ſay, and invoking his vengeance if they utter what is falſe.—This ſtatute was followed about ſix years after by another ſtatute 7 & 8 *Wm.* 3. *c.* 34: which allows a *Quaker* to *affirm* in caſes where *other perſons* are required to take an *oath*. But though the legiſlature had taken notice that they ought not to be puniſhed ſo far as barely their own opinion and ſcruples went; yet they did not extend the indulgence ſo as to let it operate in prejudice to the rights of other perſons. It is much, that even at that time they were not permitted to give evidence in this form in all caſes whatſoever. (I will ſtate the reaſons of it by and bye.) It has been truly ſaid, that ſince the caſe of *Omichund* verſus *Barker**, and another caſe of great authority determined ſince, the nature of an appeal to heaven, which ought to be received as a full ſanction to evidence, has been more fully underſtood. I there argued, and the judges in delivering their opinions agreed, that upon the principles of the common law, there is no particular form eſſential to an oath to be taken by a witneſs: But as the purpoſe of it is to bind his conſcience, every man of every religion ſhould be bound by that form which he himſelf thinks will bind his own conſcience moſt. Therefore, though the Chriſtian oath was ſettled in very early times, yet *Jews*, before the 18th of *Edward* the Firſt, when they were expelled the kingdom, were permitted to give evidence at common law; and were ſworn, not on the Evangeliſts, but on the Old Teſtament

* In *Cane. Mich.* 1744. 1 *Atkins* 21.

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tament. No distinction was taken between their swearing in a civil or in a criminal case.

Since the case of *Omichund* versus *Barker*, a question was referred to all the judges of *England*, whether a *Turk* should be permitted to swear on the *Alcoran* in a prosecution for a capital offence at the *Old Bailey*; and they were all unanimously of opinion that he might.

It is objected, that the Quakers are the only people in the world who ever refused to *swear*; but in *substance* their affirmation is the same thing: The *form* only is different; for an affirmation is a most solemn appeal and attestation to God of the truth.

There is a remarkable case reported in 2 *Sid.* 86. where Dr. *Owen*, Vice Chancellor of *Oxford*, in the year 1657, being called as a witness, refused to kiss the book; but desired it might be opened before him, and he lifted up his right hand. The jury prayed the opinion of the court, if they ought to give the same credit to him as to a witness sworn in the usual manner; and *Glynn* Chief Justice told them, that in his opinion he had taken as strong an oath as any other witness: but, said he, "if I were "to be sworn, I would kiss the book."

There is a sect in *Scotland* who hold it to be idolatry at this day to kiss the book: But their own form of swearing is much more solemn. At *Carlisle*, in the year 1745, upon a prosecution of some of the rebels, there was no evidence but of this sect, who would not kiss the book; and a case was sent up for advice, whether they could be received as witnesses. It was the opinion of those who were consulted here, that the evidence might be received; but it was not an object, and the prosecution went no further.

With regard to the exception against the testimony of Quakers in *criminal prosecutions*, it was occasioned by a strong prejudice in the minds of the great men who passed the *stat.* 7 & 8 *Wm.* 3. *c.* 34. I have looked into the debates of those days, and find that every step and clause of the act was fought hard in the House of Commons, and carried by small majorities. I know not whether the exception came in by way of *amendment*, but I think it did. It was first a temporary act, for *seven* years only. By *stat.* 13 *Wm.* 3. *c.* 4. it was continued for *eleven* years; and in the year 1713 there was an application to the House of Commons to make it *perpetual*, but it was rejected. An application was afterwards made to the House of Lords, who passed the bill, and it went down to the House of Commons; but they would not give it even a first read-

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ing. The whole history of the act may be seen in a very incorrect work, which never received the author's finishing hand; I mean Dr. *Swift*'s four last years of Queen *Anne*; and it is observable that Dr. *Swift* commends the House of Commons for the opposition they gave to the act. 1776. ATKINSON *v. Jat* EVERITT.

On the accession of the present family to the throne, it was made perpetual, by *stat.* 1 *Geo.* 1. *st.* 2. *c.* 6. But the exception still remained in criminal cases or criminal causes: and it is extraordinary, that though many alterations were made in it by *stat.* 8 *Geo.* 1. *c.* 6. yet no variation was made as to this particular; which in some instances bears hard upon the Quakers; and leaves them in a worse condition than they were when their sect first arose. For before the *stat.* 7 & 8 *Wm.* 3. *c.* 34. if a Quaker were indicted for a capital offence, he might call Quakers as witnesses in his defence, and that without oath; for formerly the prisoner's witnesses were not sworn. But now by *stat.* 1 *Ann. st.* 2. *c.* 9. *sect.* 3. all persons examined in criminal cases must be examined on oath, both for and against the crown; therefore, if a Quaker be indicted, he cannot have the benefit of Quaker testimony.

It is not possible to say why the exception was made; but it is made, and must be followed.

The effect, however, is, that it is an exception not to be extended by equity. In remedial cases, the construction of statutes is extended to other cases within the reason or the rule of them. But where it is a hard positive law, and the reason is not very plainly to be seen, it ought not to be extended by construction.

We come then to this question: Is the present a *criminal cause?* A Quaker appears, and offers himself as a witness; can he give evidence without being sworn? If it is a *criminal case*, he must be sworn, or he cannot give evidence.

Now there is no distinction better known, than the distinction between *civil* and *criminal law*; or between *criminal prosecutions* and *civil actions*.

Mr. Justice *Blackstone*, and all modern and ancient writers upon the subject distinguish between them. *Penal* actions were never yet put under the head of criminal law, or crimes. The construction of the statute must be extended by equity to make this a *criminal* cause. It is as much a *civil* action, as an action for *money had and received*. The legislature, when they excepted to the evidence of Quakers in *criminal* causes, must be understood to mean causes *technically* criminal; and a different construction would not only be injurious to Quakers, but prejudicial to the rest of the King's subjects who may want their testimony. The

*Penal* actions are *civil* suits.

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ATKERSON *versus* EVERITT.

* *Vide* 1 *Wilf.* 125. 2 *Str.* 1227.

case mentioned by Mr. *Rooke* of Sir *Watkyn Williams Wynne* verſus *Middleton* *, is a very full authority, and alone ſufficient to warrant the diſtinction between civil and criminal proceedings. In that caſe the queſtion was, Whether the *ſtat.* 7 & 8 *Wm.* 3. *c.* 7. was penal or remedial? The court held "it was not a penal ſtatute. But "ſuppoſing it was to be conſidered as a penal ſtatute, yet it was "alſo a *remedial law*; and therefore the objection taken was cured "by *ſtat.* 16 & 17 *Car.* 2 *c.* 8." Now the words of exception in that ſtatute, and alſo in *ſtat.* 32 *Hen.* 8. *c.* 30. and in *ſtat.* 18 *Eliz. c.* 14. are "*penal actions* and *criminal proceedings*." But Lord Chief Juſtice *Willes*, in delivering the ſolemn judgment of the court, ſays, there is another act which would decide of itſelf, if conſidered in the light of a new law, or as an interpretation of what was meant by penal actions in the *ſtat.* 16 & 17 *Car.* 2. *c.* 8. This is the ſtatute of *jeofails* 4 *Geo.* 2. *c.* 26. for turning all law proceedings into *Engliſh*, and it has this remarkable concluſion, "that every ſtatute of *jeofails* ſhall extend to *all forms and pro-* "*ceedings in Engliſh* (except in *criminal caſes*); and that this "clauſe ſhall be conſtrued in the moſt beneficial manner." This is very deciſive.

No authority whatever has been mentioned on the other ſide, nor any caſe cited where it has been held that a *penal* action is a *criminal* caſe; and perhaps the point was never before doubted. The ſingle authority mentioned againſt receiving the evidence of the Quaker in this caſe is, an appeal of murder †. But that is only a different mode of proſecuting an offender to death. Inſtead of proceeding by indictment in the uſual way, it allows the relation to carry on the proſecution for the purpoſe of attaining the ſame end, which the King's proſecution would have had if the offender had been convicted, namely, *execution*: and therefore, the writers on the law of *England* claſs an appeal of murder in the books under the head of criminal caſes.

† 2 *Str.* 856.

With regard to caſes that have been cited as happening here, it is aſtoniſhing that it ever ſhould have been doubted after the act of toleration, and after the *ſtat.* 7 & 8 *Wm.* 3. *c.* 34. when an attachment was moved for againſt a Quaker, whether or no he ſhould be at liberty to give an anſwer on his ſolemn affirmation, without being obliged to take an oath. But it is true that it was doubted three times in Lord *Hardwicke*'s time, and never reſolved ‡; for the court avoided the queſtion by diſcharging the rule upon ſome other matter. I conſider it, that as to his own anſwers, he is a good witneſs; for after the act of toleration, it was ſettled in the caſe of Sir *Thomas Harriſon*,

‡ Rex v. Bell, *Andrews* 200.

*riſon*, Chamberlain of the city of *London*, verſus *Evans*, purſuant to the opinion of all the judges except one, "that a *diſſenter* from "the Church of *England* is not guilty of a *crime*, *barely* by having "that *religious opinion**."

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Quakers,

* The particulars of that caſe were as follow: *Harriſon* levied a plaint in the ſheriff's court of the city of *London* againſt *Evans* in a plea of debt for ſix hundred pounds, for not ſerving the office of ſheriff, having been duly nominated, elected into and publicly called upon to give his conſent to take upon him the ſaid office purſuant to the charter of King *John*, the acts of the Common Council, *&c.* The defendant pleaded *firſt*, the corporation act, 13 *Car.* 2. *ſt.* 2. *c.* 1. *ſect.* 12. by which it is enacted, "That no perſon ſhall be elected into any office, or place in "the act mentioned concerning the government of any corporation, who ſhall not "within one year before his election have received the ſacrament of the Lord's "Supper according to the rites of the church of *England*, and have taken the oaths "of allegiance and ſupremacy, and ſubſcribed the declaration in the ſaid act ſpe-"cified: And in default thereof, every ſuch placing, election and choice, is de-"clared to be void." The defendant further pleaded the toleration act, 1 *Wm.* and *Mar. c.* 18. and then pleaded in ſubſtance and to the effect following: That the office of ſheriffs of *London* is an office to which the proviſion of the ſtat. 13 *Car.* 2. *ſt.* 2. *c.* 1. extends; that he is, and was at the time of the pretended election of him to the ſaid office, a *Proteſtant diſſenter*, qualified agreeably to the terms of the ſtat. 1 *Wm.* and *Mary*, *c.* 18. and that he had *not*, within one year next before the ſaid *pretended election*, *taken the ſacrament of the Lord's Supper* according to the rites of the *Church* of *England*, nor had ever, or *could* he in *conſcience* take the ſame, and that he was not bound by law to take the ſame, of which the Liverymen of the city had *due notice* at and before the time of the election; and by reaſon of the premiſes, *&c.* the ſaid liverymen were *prohibited* from *electing* him to the ſaid office; and the ſaid defendant was *diſabled*, and utterly *incapable* of being *elected* to be one of the ſheriffs of the ſaid city of *London*, and thereby the ſaid *ſuppoſed election* was *void*. The plaintiff in his replication ſet forth the ſtat 5 *Geo.* 1. *c.* 6. *ſect.* 1. for *quieting and eſtabliſhing corporations*, by which it is enacted, "That all perſons actually in the "poſſeſſion of any office, and who are required by ſtat. 13 *Car.* 2. *ſt.* 2. *c.* 1. to "take the ſacrament of the Lord's Supper according to the rites of the church of "*England* within one year, *&c.* ſhall be confirmed in their reſpective offices, notwithſtanding their omiſſion to take the ſacrament as aforeſaid, and ſhall be indemnified from all incapacities," *&c.*

To this replication the defendant demurred. The plaintiff joined in demurrer, and, on argument in the ſheriff's court, judgment was given on the demurrer for the plaintiff. The defendant brought a writ of error returnable in the court of huſtings of *Common Pleas* in the city of *London*, aſſigned the general errors, and the plaintiff rejoined there was no error: The court of huſtings affirmed the judgment. Upon which the defendant obtained a ſpecial commiſſion of errors directed to Sir *John Willes*, Chief Juſtice of the *C. B.* Sir *Thomas Parker*, Chief Baron, Sir *Michael Foſter*, Juſtice of *R. B.* The Honourable *Henry Bathurſt*, Juſtice, *C. B.*, and Sir *Eardly Wilmot*, Juſtice of *R. B.*, or any two of them, to inſpect the ſaid judgment and affirmance thereof at *Guildhall*. After three ſolemn arguments before the Judges, in the ſaid commiſſion named, on the 5th of *July* 1768, the ſaid ſeveral judgments of the ſheriff's court, and the court of huſtings, were reverſed by the

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Quakers, therefore, ſince that act, are not in the eye of the law guilty of a crime by ſaying that ſincerely they cannot ſwear according to our form of oath. It is a fair excuſe for them, and a reaſon for diſpenſing with the uſual form; otherwiſe by reaſon of their ſcruples they would be impriſoned for life; for you cannot take their anſwer upon interrogatories.

Neither of the acts diſpenſe with a Quaker's giving evidence in a criminal caſe; and an attachment will go upon refuſal. But he might now ſay the toleration acts indemnify me, and take notice of my ſcruples.

It is remarkable that the ſtat. 7 & 8 *Wm.* 3. *c.* 34. in the firſt ſection, gives Quakers a right to affirm in *all caſes* whatever where another man may take an oath. This is general; and it is inſerted by way of *exception* only that he ſhall *not* be admitted in *a criminal cauſe*. It is a purgation of himſelf not giving evidence when he is to anſwer interrogatories.

* 2 *Str.* 1219.

In the caſe of *Rex* verſus *Turner* * on a motion to quaſh an appointment of overſeers, the court ſaid, though the proſecution is in the King's name, the *end* of it is a *civil remedy*, and very properly allowed the Quaker's affirmation to be read.

It is extraordinary, that upon all the caſes of attachment not one was argued upon the ground of its being a *criminal caſe*; and to be ſure the exception might as well hold on an affirmation taken to hold to bail; becauſe it deprives a man of his liberty. The very laſt attachment for non-performance of an award was obtained in this court upon a Quaker's affirmation, and not a word ſaid by way of objection to it. That was the caſe of *Taylor* verſus *Scott*.

the *unanimous* opinion of all the Judges, in the ſaid commiſſion then ſurviving, Lord Chief Juſtice *Willes* being before that time dead.

The plaintiff afterwards brought a writ of error returnable in Parliament, which was argued by Mr. *Charles Yorke*, and Mr. *Norton* for the plaintiff; and by Mr. *De Grey* and Mr. *Willes* for the defendant: And on *February* 4th 1767, counſel having been fully heard, the following queſtion was put to the judges: "Whether, "upon the facts admitted by the pleadings in the cauſe, the defendant is at liberty "or ſhould be allowed to object to the validity of his election on account of his not "having taken the ſacrament according to the rites of the church of *England*, "within a year before, in bar of this action?"

The Judges differing in opinion were heard *ſeriatim*: *Six* of the Judges preſent delivered their opinions with their reaſons in the *affirmative*; and the remaining Judge * preſent delivered his opinion with his reaſons in the negative. Whereupon it was ordered and adjudged that the *judgment* given by the *commiſſioners delegates*, reverſing the judgments given by the ſheriff's court, and court of huſtings, be *affirmed*.

* Mr. Baron *Perrott*.

We

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We are not under the leaſt embarraſſment in the preſent caſe: for there is not a ſingle authority to prove, that upon a penal action a Quaker's evidence may not be received upon his affirmation. Therefore, I am of opinion that Mr. Juſtice *Nares* did perfectly right in admitting this Quaker to be a witneſs upon his affirmation; and conſequently that the rule for a new trial ſhould be diſcharged.

The three other Judges concurred.

Rule diſcharged.

Mr. *Rooke* mentioned that in *Co. Litt.* 284 and 287, the writ of *appeal* is ranked under *placita criminalia*.

## BEXWELL *verſus* CHRISTIE.

*Saturday, Feb.* 3d.

Action does not lie againſt an auctioneer for ſelling a horſe at the higheſt price bid for him, contrary to the owner's expreſs directions not to let him go under a larger ſum named. Otherwiſe, if the owner had directed the auctioneer to *ſet* the horſe *up* at ſuch a particular price; and not lower.

THIS was an action on the caſe, brought by the plaintiff againſt the defendant an auctioneer, and ſo ſtated to be by profeſſion in the declaration, for careleſsly and negligently ſelling the plaintiff's gelding, which he had directions not to let go under 15 *l.* for a leſs ſum, *viz.* 6 *l.* 16 *s.* 6 *d.* contrary to ſuch directions, and contrary to his undertaking not to ſell it under the ſaid ſum of 15 *l.* Plea not guilty. Verdict for the plaintiff, ſubject to the opinion of the court upon this queſtion; Whether, under the circumſtances of this caſe, the auctioneer was bound to bid for and buy in the horſe, if no one bid to the amount of 15 *l.* for it? The caſe at the trial appeared to be, that the auction at which the horſe was ſold, purported to be "a "ſale of goods and effects of a gentleman deceaſed, at his houſe "in the country, by order of the executor."—The horſe was not mentioned in the catalogue; but was ſent by the plaintiff to be ſold, with a written order not to let him go under 15 *l.* and the plaintiff had no other connexion with the ſale. The conditions of ſale were "that the goods ſhould be ſold to the beſt bidder." Lord *Mansfield* upon reporting the caſe ſaid, that the practice at auctions of owners buying in their own goods, ſtruck him as a fraud upon the public; and that the nature of theſe ſales required the goods ſhould go to the beſt *real* bidder.

Mr. *Mansfield* and Mr. *Morgan* for the plaintiff inſiſted, that the defendant ought to have obeyed his inſtructions, and not to have let the horſe go under the 15 *l.* That by taking the horſe from the plaintiff's ſervant and putting him up to auction, he had engaged not to ſell it for leſs than 15 *l.* and, therefore, his doing ſo

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Bexwell verſus Christie.

ſo was a fraud upon the plaintiff, who would not have left the horſe with the defendant, much leſs have had it put up to ſale at all, if he had not underſtood the defendant meant to comply with his directions, and that it was legal for him ſo to do. That this was the practice at all auctions; conſequently, if an univerſal practice, could be no fraud on any body. But in fact, this was no more than a direction to ſet the horſe up at that price, and that there ſhould be no bidding under.

Mr. *Wallace* and Mr. *Dunning* for the defendant inſiſted, that it would have been a fraud upon the ſale if the auctioneer had bid or provided a bidder to puff this particular lot or any other lot in the ſale; and, therefore, the action could not be maintained.

Lord MANSFIELD.—The matter in queſtion is in itſelf of ſmall value; but in reſpect of the principles by which it muſt be governed, it is a queſtion of great importance. Since the trial I have mooted the point with many who are not lawyers, upon the morality and rectitude of the tranſaction. The queſtion is, Whether a bidding by the owner of goods at a ſale under theſe conditions, namely, "that the higheſt bidder ſhall be the purchaſor, "and if a diſpute ariſe, to be decided by a majority of the per"ſons preſent," is a bidding within the meaning of ſuch conditions of ſale?

There is no expreſs undertaking on the part of the defendant, nor is it, as has been ingeniouſly ſaid, a direction that there ſhould be no bidding under 15 *l.* which might be fair: But the direction given to the defendant is, "not to let the horſe *go under* "15 *l.*;" which implies there might be a bidding under that ſum. The queſtion then is, Whether the owner can *privately* employ another perſon to bid for him?—The baſis of all dealings ought to be good faith; ſo, more eſpecially in theſe tranſactions, where the public are brought together upon a confidence that the articles ſet up to ſale will be diſpoſed of to the higheſt real bidder: that could never be the caſe, if the owner might ſecretly and privately inhance the price, by a perſon employed for that purpoſe; yet tricks and practices of this kind daily increaſe, and grow ſo frequent, that good men give into the ways of the bad and diſhoneſt in their own defence. But ſuch a practice was never openly avowed. An owner of goods ſet up to ſale at an auction never yet bid in the room for himſelf. If ſuch a practice were allowed, no one would bid. It is a fraud upon the ſale, and upon the public. The diſallowing it is no hardſhip

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hardſhip upon the owner. For if he is unwilling his goods ſhould go at an under price, he may order them to be ſet up at his own price, and not lower: Such a direction would be fair: Or he might do as was done by Lord *Aſhburnham*, who ſold a large eſtate by auction; he had it inſerted in the conditions of ſale, that he himſelf might bid once in the courſe of the ſale: and he bid at once 15,000 or 20,000 *l.* Such a condition is fair; becauſe the public are then appriſed, and know upon what terms they bid.—In *Holland* it is the practice to bid downwards.

The queſtion then is, is ſuch a bidding fair? If not, it is no argument to ſay it is a frequent cuſtom: Gaming, ſtock-jobbing and ſwindling, are frequent. But the law forbids them all. Suppoſe there was an agreement to abate ſo much; which is the caſe where goods are ſold by one perſon in the trade to another: they abate ſometimes 10 or 15 *per cent.* Such an agreement between the owner and a bidder, at a ſale by action, would be a groſs fraud. What is the nature of a ſale by action? It is, that the goods ſhall go to the higheſt real bidder. But there would be an end of that, if the owner might privately bid upon his own goods. There is no contract with the auctioneer. He is only an agent between the buyer and ſeller. He may fairly bid for a third perſon who employs him, but not for the owner.

In this caſe, there is another fraud put upon the public. For by the catalogue the goods are deſcribed to be "the goods of a "gentleman deceaſed, and ſold by order of the executor." Upon this repreſentation, many people would attend to bid, on a ſuppoſition that the goods were neceſſarily to be ſold at all events, whether valuable or not valuable; whereas they might have their ſuſpicions if they were the property of perſons living. Horſes, or any other ſpecies of property, belonging to perſons that are dead, are not ſo likely to be faulty as thoſe which are parted with by perſons in their life-time.

We all remember the ſale of a gentleman's wines*, where vaſt quantities had been ſent in belonging to other perſons: And all ſold at a very high price, under an idea they were his. The conſequence was, moſt of the buyers were taken in.

* Mr. Bradſhaw's.

Therefore, upon full conſideration, I am of opinion, that a bidding by the owner in the manner contended for, and agreeable to the directions given in this caſe, would have been a fraud upon the ſale: And conſequently, that this action againſt the defendant as auctioneer, cannot be maintained.

ASTON, Juſtice—I am of the ſame opinion. The directions in this caſe are neither agreeable to the catalogue or the conditions.

Mr.

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Mr. Justice *Willes* and Mr. Justice *Ashhurst* were of the same opinion.

BEXWELL *versus* CHRISTIE.

*Per Cur.*—Rule for a new trial without costs, altered to a nonsuit without costs.

*Vide* stat. 17 *Geo.* 3. *c.* 50. *sect.* 10. and stat. 19 *Geo.* 3. *c.* 56. *sect.* 12.

*Howard* v. *Castle*, 6 *T. R.* 642.

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*Same day.*

## ALEXANDER *versus* VAUGHAN.

One who has traded to England, whether native, denizen, or alien, tho' never a resident trader *in* England, but who comes over here occasionally, and commits an act of bankruptcy, is an object of the bankrupt laws.

THIS was an action of trespass against the messenger to a commission of bankruptcy for seizing the books, papers, and bills of exchange of the plaintiff.

The defendant pleaded, *1st*, The general issue; *2dly*, A justification under the statute 13 *Eliz. c.* 3.; *3dly*, A justification under a commission of bankruptcy issued against the plaintiff, setting forth the proceedings at large.—To the *last* plea, the plaintiff *replied*, that he was not a *merchant* and *trader*, and a person within the description of the bankrupt laws.

At the trial before Lord *Mansfield* at the sittings after *Michaelmas* term, 1775, at *Westminster*, a general verdict was found for the plaintiff.

Upon a motion by Mr. *Wallace* for a new trial, Lord *Mansfield* reported the case shortly thus:

*Alexander*, the plaintiff, who was a native of *Scotland*, resided there, and had a great house of trade at *Edinburgh*: besides that business, he was concerned as partner with *Bell* and Company in a great brewery. In both characters he might be considered as one of the greatest traders in *Europe*, and he traded to all parts of the world. He comes to *England*, and being there *occasionally*, is arrested, and lies in prison *two* months, which is an act of bankruptcy.

The question is, Whether by the *English* statutes against bankrupts, a person, to come within the meaning and description of a trader there named, must not be a *resident* trader; that is, Whether, as the act of bankruptcy must be *local*, in *England*, the trading should not be so likewise? or, Whether such a person as the plaintiff, coming *occasionally* to *England*, is liable to the *English* laws against bankrupts?

This is the general question.—But the defendant insists, that be the general question as it may, the plaintiff in fact traded *in England* after his coming here, and several instances were given in evidence

evidence at the trial, and left to the jury. But they are not neceſſary to be moved till the court has decided the firſt point; therefore let the rule be, to ſhew cauſe why a nonſuit ſhould not be entered, with liberty to move for a new trial, if the court ſhould be of opinion with the plaintiff. 1776. ALEXANDER verſus VAUGHAN.

Mr. *Dunning*, Mr. *Davenport*, and Mr. *Lucas* now ſhewed cauſe.

The general queſtion is, Whether a *Scotch* trader, occaſionally coming to *England*, and committing an act of bankruptcy, is entitled to the benefit of the laws againſt bankrupts *in England?* They argued he was not. That the deſcription of perſons who may become bankrupt by the ſtatute 13 *El. c.* 7. *ſtat.* 1 *Jac.* 1. *c.* 15. and *ſtat.* 21 *Jac.* 1. *c.* 19. is, "merchants or other perſons uſing "the trade of merchandize, *&c. being ſubjects born of this realm or "denizens.*" That one of the acts of bankruptcy ſpecified by the ſtatutes, is "*departing the realm,*" which cannot be ſaid of a *foreigner.* That a *Scotchman*, ſince the union, is as much a foreigner in reſpect of theſe ſtatutes, which do not extend to *Scotland*, as any other alien; and therefore to ſay, that from the circumſtance of the plaintiff's trading *to England*, the bankrupt laws upon his arrival here immediately attach upon him, would be to make the bankrupt laws binding upon all the world. Such a conſtruction would alſo be attended with the moſt miſchievous conſequences, as it would be an encouragement to indigent foreigners to reſort to this country, merely for the purpoſe of clearing themſelves by a commiſſion, and highly injurious to their creditors, who might not even have notice of it till after the certificate was obtained.

Mr. *Wallace*, *contra*, for the defendant, inſiſted that the plaintiff was an object of the bankrupt laws. That by *ſtat.* 21 *Jac.* 1. *c.* 19. *ſect.* 15. "Strangers, as well as natural-born ſubjects and "denizens are expreſsly made liable to the bankrupt laws." A man born here, and eſtabliſhed in a foreign country in trade, coming over here, is liable to a commiſſion. An alien coming here is liable to be arreſted, and to all demands of creditors. He may aſſign all his effects for the benefit of his creditors, and there is no diſtinction between *Scotch*, *Iriſh*, *Dutch*, *French*, or any other alien. He cited *ex parte Smith*, from Mr. *Philip Carteret Webb's* notes, before Lord *Hardwicke*, 23d *December* 1737. "*John Aſh-*"*ley* went from *England* in 1720, and reſided in *Barbadoes* till "1735; where he was a factor, and planter, and traded *to Eng-*"*land*, by ſending goods from his plantations, and receiving goods "back again bought in *England*; and diſpoſed of goods, ſent from

"*England*

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"*England* to *Barbadoes*, for merchants in *England* as a factor; "and being greatly indebted, came to *England* in *April* 1737; "and committing an act of bankruptcy, a commiſſion iſſued:" Upon a queſtion, Whether he was within the ſtatutes of bankrupts, the caſe of *Sedgewick* verſus *Bird*, 1 *Salk.* 110. *Dodſworth* verſus *Anderſon*, 2 *Jones*, 141, 142. and *Raym.* 175. *S. C.* were there cited. Lord *Hardwike* ſaid—"If this point had not been "decided in *Sedgewick's* caſe he ſhould have doubted; but as it "was there decided, he held himſelf bound by that determina-"tion."—This doctrine was again recognized by Lord *Hardwicke* in a caſe *ex parte Williamſon*, 2 *Vez.* 249. 252. and 1 *Atk.* 82. *S. C.* In this latter caſe Lord *Hardwicke* treated it as a ſettled point, that a trader abroad, who has traded *to England*, coming over here, is an object of the bankrupt laws: his only doubt was, whether there was not ſome colluſion.—But it is clear there can be no colluſion in this caſe, becauſe the plaintiff himſelf diſputes the commiſſion.

Mr. *Mansfield* was going to argue on the ſame ſide; but Lord *Mansfield* ſtopped him, ſaying, he had rather hear what anſwer could be given to the authorities cited, and whether the court was not bound down by them.

Mr. *Dunning* and Mr. *Davenport* in reply, ſaid, that as to the caſe of *Sedgewick* verſus *Bird*, the matter did not undergo a diſcuſſion before the court upon argument, but was only held ſo on a trial at bar; which, in fact, was not of much higher authority than an opinion at *niſi prius*. And therefore it was more than probable, that the court did not, at the time, weigh the extenſive bad conſequences attending ſuch a determination. That that caſe, like the others, was moſt probably the caſe of an *Engliſhman* returning from abroad hither. That as to the caſes of *Aſhley* and *Williamſon*, they both ſubmitted to the commiſſion; and, therefore, it was but reaſonable that the creditors abroad ſhould have time to come in and prove their debts. They again inſiſted, that an actual reſidence in *England* was neceſſary to ſubject a man to the bankrupt laws, and that the particular act of bankruptcy deſcribed in the ſtatutes of "*departing the realm*," muſt mean a departing from the bankrupt's *home*; but it could never be ſaid that a perſon *not reſident* in *England*, departed from *England* as his home; much leſs could it be ſaid of a *foreigner*, who had never before been in *England* in his life.

Lord MANSFIELD.—There have been many things ſaid at the bar which have nothing to do with the queſtion now before the court. 1*ſt*, With what view the commiſſion was taken out? 2*dly*, With what

what view the plaintiff lay in prison, or why he now opposes the commission. 3*dly*, To what amount the plaintiff traded in *England*. 4*thly*, The instances of his trading in *England*. All these are out of the question. For supposing the general question to be with the plaintiff, I left the instances of trading to the jury, who thought they were not sufficient proof of the plaintiff's having traded in *England*, and as to that point, I gave the defendant leave to move for a new trial. The time of the plaintiff's being in *England* is also immaterial. 1776. ALEXANDER *versus* VAUGHAN.

The case is simply this; a merchant who has traded to *England*, but who is a native of, and constantly resident in, a country not subject to the *English* statutes concerning bankrupts, comes *occasionally* to *England*, is arrested, and lies in prison two months, which is an act of bankruptcy. The question is, Whether such person, having traded *to* England, not *in* England, is an object of the bankrupt laws?

The circumstance of a trader being a natural born subject, or a foreigner, makes no difference. The last section of *stat.* 21 *Jac.* 1. *c.* 19. expressly declares, that "strangers, as well as natural "born subjects and denizens, shall be subject to the bankrupt "laws;" and therefore it puts that point out of the case. But it still leaves the question, whether both natives and foreigners must not be traders in *England*.

I own, when the general question was started at the trial, I felt great objections, upon principles of justice, to the idea of a foreigner, occasionally coming here, being subject to the bankrupt laws. Whoever gives credit, gives it upon the property a man has in the country where the credit is given. I was also struck with the very inconvenient consequences that might arise in different parts of our dominions, if a trader might come over here behind the back of his creditors, hurry through a commission, and obtain his certificate, before his creditors abroad could even know the commission had issued. On the other hand, it appeared there was a locality in the description of the acts of bankruptcy, and that the trader, whether a native or foreigner, must be *in England* when he commits an act of bankruptcy. Therefore I determined not to give any binding opinion at *nisi prius*.

The case *ex parte Williamson*, 1 *Atk.* 82. did not strike me then, as it does now; for the opinion there given was not an opinion founded on any part of the case before the court. At the same time I never doubted but that many such commissions have issued, and that many persons have come from *Ireland* and the plantations, on purpose to get commissions taken out against themselves.

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ſelves. I recommended it therefore to the counſel to ſearch for caſes decided upon the point. That ſearch has been made, and ſeveral authorities have been produced.

I am confirmed in every objection that aroſe in my mind upon general principles, by what Lord *Hardwicke* ſays; but if in the year 1750 he did not think the matter entire, I think it is not ſo now. However it may ſtand upon principles, I think we are bound by the authorities. The caſes of *Dodſworth* verſus *Anderſon*, Sir *T. Raym.* 315. and *Sedgewick* v. *Bird*, 1 *Salk.* 110. are ſtrong authorities upon the ſubject. The firſt goes a great way: The court there ſay, "though it be found that the bankrupt bought "and ſold but *once in England*, it is *not neceſſary* that he ſhould do "ſo; for many merchants do only *buy beyond ſea*, and *ſell* here; "it is *trading* that makes a man capable of being a bankrupt, "and it is plain that *Grice* did trade *in England*." From what the court had juſt ſaid before, I take that to mean *to England*.

The caſe of *Sedgewick* verſus *Bird*, is much ſtronger: becauſe the bankrupt in that caſe never did any act of trade *in England*.

But the moſt material authority of all, is the caſe *ex parte Smith* in *Canc. Dec.* 25th, 1737, upon the bankruptcy of one *Aſhley*, who was never reſident *in England*, nor had ever traded *in England*. That caſe was ſolemnly argued before Lord *Hardwicke*, and the ſeveral caſes abovementioned were cited and relied on. The bankrupt came over on purpoſe to get the commiſſion taken out againſt him. The opinion given by Lord *Hardwicke* in that caſe is much ſtronger, becauſe he had no doubt that the commiſſion was fraudulent; and therefore he gave his opinion both againſt his inclination, and againſt what he thought the juſtice of the caſe. The words of his opinion are very ſtrong. "The "new laws relating to bankrupts have turned the edge of com-"miſſions of bankruptcy, from being, as they were *originally*, *re-*"*medial* to the *creditor*, and in the nature of *puniſhments* to the "*bankrupt*, whom they conſidered as an offender, to be the acci-"dental occaſion of great frauds. This has been the caſe here, "and I will, as far as I can, prevent the extending them to other "parts of the world. If the act of bankruptcy had been committed "abroad, to be ſure no commiſſion ought to go againſt him for "that act. The affidavits ſpeak only of his trading *to England*, "while he reſided at *Barbadoes*. If this point had not been de-"termined in *Sedgewick*'s caſe, I ſhould have doubted of it; but "that caſe is *in point*, and muſt govern this. However, I will ſuſ-"pend the allowance of the certificate till the creditors abroad "have an opportunity to ſend over proofs of their debts."

This

This throws a different light upon the caſe *ex parte Williamſon* before Lord *Hardwicke* in the year 1750, which was 13 years afterwards; and ſhews, that he continued of the ſame opinion then, though the ſame point was not immediately in queſtion before him at that time. 1776. ALEXANDER *verſus* VAUGHAN.

Here the plaintiff traded *to England*, and never was a reſident trader *in England*, but came hither only *occaſionally*. The conſequence is, that a nonſuit muſt be entered.

The other judges concurred.

*Per Cur.* Verdict ſet aſide, and a nonſuit entered.

## CAMERON *et al. verſus* REYNOLDS, Under Sheriff.

*Monday, Feb. 5th.*

All actions for *breach* of *duty* of the office of ſheriff, muſt be brought againſt the *high ſheriff*, though by default of the *under ſheriff* or *bailiff*.

THIS was a ſpecial action on the caſe, in which the declaration ſtated, that the plaintiffs had recovered a judgment againſt one *Fancourt*: That a *fi. fa.* was ſued out and delivered to the ſheriff, by virtue of which he ſeized and took goods and chattels to the amount of 90 *l.* 4 *s.* and aſſigned the goods to one *J. Brown*, in truſt for the plaintiffs. That the defendant at that time was *under-ſheriff*, and by *virtue of his office* ought to have executed to *J. Brown* a bill of ſale of the ſaid goods: That a bill of ſale was prepared, and the defendant was requeſted to ſign it, the *ſum* and all *fees* being offered to him: That the defendant refuſed to ſign it, and afterwards executed another bill of ſale to one *Richard Cavel*, and put him into poſſeſſion; by means whereof the plaintiffs were put to a great deal of expence in an application to the court of *B. R.* to cancel the ſaid bill of ſale to *Cavel*, and in keeping poſſeſſion pending the application, and in paying warehouſe rent. Plea, not guilty. Verdict for the plaintiff. Damages 60 *l.*

*Cavel* took poſſeſſion, kept it about a month, and received the money in the ſhop, to the amount of about 20 *l.* After quitting the poſſeſſion, *Cavel* brought an action againſt the plaintiffs and their ſervants, for ſeizing and taking the goods, and brought an action for keeping poſſeſſion of the houſe.

In order to put a ſtop to theſe actions, the preſent plaintiffs obtained a rule for the ſheriff to execute a bill of ſale to *J Brown*, and that the bill of ſale to *Cavel* ſhould be cancelled: That *Cavel* ſhould account with *Brown* for the money received from the ſale of the goods in the ſhop, and that all further proceedings in the

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actions brought by *Cavel* againſt the preſent plaintiffs and one *Alexander Lobban* ſhould be ſtaid.

At the trial, the caſe made out on the part of the plaintiffs was as follows: The judgment and execution were proved, and that the *fi. fa.* was delivered to the defendant, then the *under-ſheriff*, who ſeized ſeveral goods under it; and, upon an application to him for that purpoſe, promiſed to execute a bill of ſale to the nominee of the plaintiffs, and ordered him to be put into poſſeſſion. That afterwards a bill of ſale was made out for him by order of the defendant, and the uſual fees paid. That the defendant was then required to execute it, but he refuſed, unleſs the money ariſing from the ſale was paid into his own hands. This the attorney for the plaintiffs refuſed to comply with; and made application to one of the high ſheriffs, offering to pay the money into the hands of a banker. The high ſheriff thinking it reaſonable, ſent a meſſage to the defendant, recommending him to execute the bill of ſale, and the plaintiffs then offered to pay the ſum for which the goods were ſold, and all fees to the defendant. But he abſolutely refuſed to do it, and executed a bill of ſale to *Cavel*. The rule of the court of *B. R.* abovementioned was then read, which was not founded upon a motion for an attachment againſt the defendant perſonally, or for miſbehaviour by him or the ſheriff, but was a rule for a ſpecific relief. Then the plaintiffs proved the coſts they had been put to in making that application, and their expence in keeping poſſeſſion of the goods.

Lord *Mansfield*, after reporting the caſe, ſaid, there were three points ſaved at the trial. *1ſt*, Whether the action would lie againſt *Reynolds*, the *under-ſheriff*? *2dly*, Whether the rule of court was not a bar to the action? *3dly*, Whether his lordſhip did right in leaving the coſts to the jury in damages, as *Reynolds* was no party to the rule?

The rule that had been obtained was to ſhew cauſe, why a nonſuit ſhould not be entered, or why the judgment ſhould not be arreſted, or why a new trial ſhould not be granted.

Mr. *Dunning* and Mr. *Buller* now ſhewed cauſe; and as to the firſt queſtion inſiſted, that though the action might have been brought againſt the high ſheriff, yet it alſo lay againſt the under-ſheriff, and in this caſe was properly brought againſt *him*, becauſe *he only* was in fault. For the high ſheriff, when applied to, was of opinion, and deſirous the bill of ſale ſhould be executed to the plaintiffs, but the defendant refuſed to execute it.—1 *Roll. Abr.* 94. *Pl.* 4. "An action lies by the demandant in a writ of en-

"try

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"try *ſur diſſeiſin, if he pleaſes*, againſt the *under-ſheriff*, who has "received his fee to return a writ of ſummons, and does not re-"turn it". 1 *Leon.* 146. *pl.* 203. *S. C.* So againſt the *under-bailiff* of a *liberty*, who has levied the debt under a warrant upon a *fi. fa.* for *concealing the writ.* 1 *Ro. Abr.* 94. *Pl.* 5. So againſt an *under-ſheriff* for proceeding after a *habeas corpus* delivered. *Iplett* v. *Williams*, 3 *Leon.* 99. It is clear from theſe authorities, that the plaintiffs had it in their election to ſue *either*; and if ſo, the court would not in this caſe make the high ſheriff, who has done no fault, liable; and leave him to ſeek his remedy over againſt the under-ſheriff who was alone in fault.

As to the queſtion, whether a nonſuit ſhould be entered, or the judgment arreſted, they inſiſted, if the objection to the action lay at all, it was upon the face of the record; and therefore, the latter would be the proper rule.

*Secondly*, Suppoſing the action well founded, the rule for cancelling the bill of ſale to *Cavel* could not be taken into conſideration in this action; for it was a rule in another cauſe, *viz.* between *Cavel* and the plaintiffs

*Thirdly*, The coſts were occaſioned by the defendant, and therefore ought to be included in damages upon this action; otherwiſe the plaintiffs would be ſufferers.

Mr. *Wallace* and Mr. *Davenport*, in ſupport of the rule, contended, that the high ſheriff was the perſon alone reſponſible to the plaintiffs. The law looks upon him only, and if he is a ſufferer by the miſconduct of the under-ſheriff, or any other of his officers, he has his remedy over againſt them. They admitted an action lay in the caſes cited; but there it was by virtue of the ſtatute of *Weſtminſter* 2. *c.* 39. and 28 *Ed.* 1. *c.* 16. and ſo it appears in *Dalton's Sheriff*, 483, 4. and Doctor and Student, *c.* 42. But *ſecondly*, Suppoſing the plaintiffs had their election in this caſe, the rule upon the former application is a complete bar to the action; becauſe under that rule the plaintiffs have already had a ſpecific relief. If ſo, they cannot have a double recompence for one and the ſame injury. *Thirdly*, The rule giving ſuch ſpecific relief being ſilent as to coſts, no action would lie for them; and therefore they ought not to have been conſidered in damages by the jury. In equity, upon a bill for a ſpecific performance, if the court upon the hearing do not give coſts, no action can be maintained for them afterwards. Here the court directed a ſpecific performance; therefore the plaintiffs are not entitled to coſts for non-performance too.—*Cur. adviſare vult.*

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Lord *Mansfield* the next day, after ſtating the caſe, delivered the opinion of the court as follows: The 1ſt objection is an objection upon the face of the declaration, that this action does not lie againſt the *under-ſheriff*, and therefore that judgment ought to be arreſted. As to that, we are all of opinion, the action does not lie againſt the under-ſheriff. It is an action brought againſt him for a breach of duty in the office of ſheriff. Wherever that is the caſe, the action muſt be brought againſt the high ſheriff, as for an act done by him; and if it proceeds from the default of the under-ſheriff or bailiff, that is a matter to be ſettled between them and the high ſheriff.

An action does not lie againſt the ſheriff upon a promiſe to execute a bill of ſale to the plaintiff's nominee.

The next objection which ariſes on the face of the declaration is, that the *giſt* of the action is, the defendant's having refuſed to execute a bill of ſale to the *nominee* of the plaintiffs, *contrary* to his *promiſe* ſo to do, and in *breach of his office*. As to that, it is no part of the duty of the office of ſheriff to execute a bill of ſale at an *appraiſed value*. It might be very inconvenient and highly injurious to defendants if it were. The legal and proper mode of compelling a ſale by the ſheriff, where he makes delay or refuſes, is by writ of *venditioni exponas*; upon which he muſt return the money into court. But he is not compellable to execute a bill of ſale to the plaintiff's nominee, becauſe he has promiſed to do ſo. Theſe objections go in arreſt of judgment.

A rule of court, giving *ſpecific relief*, in a caſe where, by law, the party is not entitled to two different remedies is a bar to an action for the ſame cauſe.

Another objection is, ſuppoſing the action would well have lain againſt the defendant, whether or no the plaintiffs have not precluded themſelves from bringing this action; having complained againſt the high ſheriff by motion, and upon ſuch motion obtained an adequate recompence by rule of court. As to that point, the caſe was this; the plaintiffs not having the bill of ſale, could not maintain an action againſt the ſecond vendee for the goods, or for the profits of the ſhop while he continued poſſeſſed: For the ſame reaſon, they could not defend themſelves againſt the actions brought by the ſecond vendee againſt them. Therefore they applied to this court, by motion againſt the high ſheriff, for a rule to ſhew cauſe why the bill of ſale to *Cavel* ſhould not be cancelled, and a new bill of ſale executed to the plaintiffs, upon the ground of the defendant having agreed ſo to do. All the facts upon which this motion was founded, were acts of the defendant *Reynolds*, which the plaintiffs, in their application to the court, looked upon as the acts of the *high ſheriff*, and not as the acts of *Reynolds*. Upon hearing all parties, the court gave the plaintiffs a *ſpecific relief*, by ordering the latter bill of ſale to be cancelled, and directing the

execution

execution of the former. After that, a man ſhall never be ſuffered to purſue a ſecond recompence. Beſides, part of the rule of the court upon the application was, that "all further proceedings ſhould be ſtaid." It is not like caſes where two different remedies are given by the law: for inſtance, where an arreſt is illegal; for there the court only correct the irregularity, and leave the party to bring his remedy for the falſe impriſonment, which the court cannot give without conſent. But in this caſe, where the whole proceedings are againſt the high ſheriff, and ſo conſidered by the plaintiffs themſelves, who make the application to the court, they ſhall be bound. 1776. CAMERON *verſus* REYNOLDS

I thought yeſterday it was material that the defendant was not a party to the rule, but I am ſatisfied now that there is nothing in that objection.

The queſtion that ariſes upon theſe two points, one of which is a ground for arreſting the judgment, and the other for a nonſuit, is what the court ſhould do? If we order a nonſuit to be entered, the plaintiff muſt pay the defendant his coſts; but if we arreſt the judgment, each party muſt pay their own coſts. Upon the whole, taking all the circumſtances and complexion of the caſe into conſideration, we think the defendant ought to prevail upon the motion in arreſt of judgment, more eſpecially as it appears upon the declaration that he might have demurred. Where a plaintiff is non-ſuited the defendant is entitled to coſts. Where judgment is arreſted, each party pays his own coſts.

*Per Cur.* Judgment arreſted.

Lord *Mansfield* added, that the proper mode would have been for the defendant to have applied to the court to ſtay the proceedings in this action.

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## SAYER *verſus* POCOCK.

*Tueſday, Feb. 6.*

MR. *Wallace* ſhewed cauſe againſt a rule to amend the record in this caſe after verdict, by adding the words, "and the "defendant does ſo likewiſe," at the end of the replication, inſtead of "&c." A prior motion had been made for a rule to ſhew cauſe why the judgment ſhould not be arreſted, upon the ground of there being in fact no iſſue joined, in conſequence of the above defect. Replication amended after verdict, by inſerting the *ſimiliter* inſtead of &c.

The action was an action on a ſheriff's bond, brought by the plaintiff againſt his bailiff. Plea, performance of the conditions generally. Replication that one *Groves* recovered judgment in another cauſe, and that the defendant ſuffered an eſcape, by which

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attachments iſſued againſt the plaintiff. Another breach aſſigned was in not returning the writ. Upon one breach the defendant let judgment go by default. And on the other, the *ſimiliter* was not added. But upon this, the cauſe went down to trial, and a defence was made. He cited 1 *Str.* 641. where upon this objection taken it was held not amendable, and the judgment arreſted.

ASTON Juſtice. There is a caſe of *Cowper* v. *Spencer*, 8 *Mod.* 376. where the plaintiff replied *de injuria ſua propria*, concluding to the country without any *ſimiliter* added: the court there held it was no iſſue: but it does not appear in that caſe, that *abſque tali cauſa* was added; nor that the concluſion to the country was followed by an "*&c.*" But here the plaintiff has added, *&c*; conſequently he meant ſomething by it. Again, in the caſe of *Cowper* v. *Spencer*, 8 *Mod.* 376. * it does not appear whether any defence was made or not. But here there was a defence made. If the *&c.* added in this caſe could be conſtrued to ſupply the place of the *ſimiliter*, it would only be iſſue misjoined and cured by the ſtatutes of *jeofails*. But if it cannot be ſo conſtrued, then it is not within the ſtatutes of *jeofails*, and the only queſtion is, whether it is amendable.

* This is the ſame caſe as in *Str.* 641.

Mr. *Dunning*, and Mr. *Davenport*, in ſupport of the rule, ſtated the proceeding to be thus: Two breaches were aſſigned under the *ſtat.* 8 and 9 *Wm.* 3. *c.* 11. To the firſt the *ſimiliter* was added; to the latter only "*&c.*" and in this form the paper-book was returned to the clerk of the papers. It was, in fact, therefore, his miſtake. For upon the paper-book being returned the clerk is warranted to add the *ſimiliter*, and award of *venire*, and every thing neceſſary for the trial. By returning the paper-book, therefore, the defendant is precluded from taking any objection; and cited *Gilbert's* Hiſtory, *C. B.* 152, 153.

Lord MANSFIELD. One is aſhamed and grieved that ſuch objections remain. They have nothing to do with the juſtice of the caſe, but only ſerve to entangle, without being of the leaſt aid in preventing irregularity.

Without conſidering whether it is within the ſtatutes of *jeofails*, or not, it is beſt to amend to avoid a writ of error; and there are three grounds which ſatisfy me that the matter in this caſe is amendable. 1*ſt*, That it is an omiſſion of the clerk. 2*dly*, I will in this caſe adopt the reaſoning of *Lord Coke*, and conſtrue "*&c.*" to mean every neceſſary matter that ought to be expreſſed †. 3*dly*, By amending, the court only make *that* right, which

† *Vide Co. Lit.* 17. b.

the

the defendant himſelf underſtood to be ſo, by his going down to trial. 1776.

The three other judges concurred.

*Per Cur.*—Rule to amend abſolute, and rule for arreſting the judgment diſcharged.

SAYER *verſus* POCOCK.

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## BRUCKSHAW *verſus* HOPKINS.

*Thurſday, Feb.* 8th.

Plaintiff allowed to bring back the *venue* after plea pleaded.

MR. *Willes*, on the part of the defendant had moved to diſcharge a rule obtained laſt term by Mr. *Buller*, on behalf of the plaintiff, for bringing back the *venue* to *London*, where it was originally laid, upon undertaking to give material evidence in *London*.—Mr. *Willes*'s objection was, that the application for bringing back the *venue* was too late.

The facts were, that, after the *venue* had been changed from *London* to *Lincolnſhire* by the defendant, upon the common affidavit, the cauſe had gone down to trial at *Lincolnſhire* aſſizes, when the plaintiff was nonſuited. This nonſuit had been afterwards ſet aſide, and a new trial directed. Accordingly, the cauſe went down a ſecond time to the aſſizes at *Lincoln*, to be tried before a ſpecial jury, but, for defect of jurors, was made a *remanet*. Mr. *Willes* inſiſted, that, after all theſe proceedings, the plaintiff could not bring the *venue* back to *London*; and cited *Dickenſon* v. *Fiſher*. 2 *Str.* 858.

Lord MANSFIELD.—The Maſter ſays, he takes the practice to be according to the caſe in 2 *Strange*. 858. But it comes to the ſame thing: For the plaintiff may at any time move to amend his declaration by altering the *venue* *.

It was adjourned for the maſter to conſider whether the plaintiff could bring back the *venue after plea pleaded*.

Lord *Mansfield* now delivered the opinion of the court.

We deſired the Maſter to inquire into the practice, and conſider, Whether the plaintiff could not bring back the *venue after plea pleaded*: The Maſter has accordingly inquired and conſidered about it; but he has not met with any thing material to the point in queſtion, except the caſe cited from 2 *Str.* 858, and two caſes upon amendment, 2 *Str.* 1,162. *Stroud* v. *Tilly*, and 2 *Str.* 1,202. *Rivet* and others v. *Cholmondeley*.

* *N. B.* That muſt be upon a rule to ſhew cauſe.

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BRUCK-SHAW *verſus* HOPKINS.

We think it would be an idle circuity to put the plaintiff to move to amend his declaration, in order to come at an alteration of the *venue*; and if we permit him *now* to bring it back, he does it at his peril; becauſe, if he does not give material evidence in *London*, he muſt be nonſuited; and if it ſhould appear to be a local action by ſtatute, he will be nonſuited upon the opening.

The conſequence is, that the former rule muſt ſtand, and Mr. *Willes* will take nothing by his motion.

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*Friday, Feb. 9th.*

## DENN *ex dim.* GEERING, *verſus* SHENTON.

IN ejectment for the recovery of certain lands in the county of *Berks*, upon not guilty pleaded, the jury found a verdict for the plaintiff ſubject to the opinion of the court upon the following caſe.

*William Geering*, being ſeiſed in fee of the premiſes in queſtion, by his will of the 28th of *November* 1738, deviſed the ſame as follows: "I give and bequeath to my grandſon, *Samuel Shen-*
" *ton*, all that my meadow ground called *Picked mead*, lying and
" being in the pariſh of *Denchworth* in the county of *Berks*, *to*
" *hold* unto the ſaid *Samuel Shenton*, and the *heirs of his body* law-
" fully to be begotten, and *their heirs for ever*, chargeable never-
" theleſs, and *charged* with the payment of *eight pounds* a year unto
" my niece *Mary Stevenſon* the elder, during her natural *life*, to be
" paid her by quarterly payments: But *in caſe* the ſaid *Samuel Shen-*
" *ton ſhall die without leaving iſſue of his body*, *then* I give and deviſe
" the ſaid meadow ground unto my nephew *William Geering* ſon
" of Mr. *William Geering*, of *Denchworth* aforeſaid, to hold unto
" the ſaid *William Geering* the ſon, and *his heirs for ever*, charge-
" able as aforeſaid, and alſo chargeable with, and ſubject to, the
" payment of *one hundred pounds*, of lawful money of *Great Bri-*
" *tain*, unto my niece *Ann Beale*, *within one year next after* the
" ſaid *William*, *or his heirs*, ſhall be poſſeſſed of the ſaid meadow
" ground."

" All the reſt and reſidue of my goods, chattels, real and per-
" ſonal eſtates whatſoever, after the payment of debts, legacies,
" and funeral expences, I give, deviſe, and bequeath unto my
" grandſon *Samuel Shenton*, *his heirs*, executors, adminiſtrators,
" and aſſigns."

The ſaid *William Geering* the teſtator died in 1739.

The ſaid *Samuel Shenton* the grandſon entered and died ſeiſed, *leaving iſſue Samuel Shenton* the younger, his only child, who alſo entered and died ſeiſed.

*Samuel*

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DENN ex dim. GEERING verſus SHENTON.

*Samuel Shenton*, the perſon laſt ſeiſed, attained 21, and died in 1768, having made his will, dated 23d *April* 1767, and thereby deviſed the premiſes to his mother, the defendant, *Mary Shenton*, and her heirs and aſſigns for ever, who entered, and is now in poſſeſſion thereof under the ſaid deviſe.

The leſſor of the plaintiff is the nephew of the teſtator *William Geering*, and ſon of *William Geering* of *Denchworth* in *Berkſhire*, mentioned in the will of the teſtator *William Geering*.

The queſtion for the opinion of the court is, Whether the leſſor of the plaintiff had a good title to recover the lands deviſed, in the ejectment mentioned?

Mr. *Baldwin* for the leſſor of the plaintiff ſtated the queſtion to be, whether *Samuel Shenton* took an eſtate *tail*, or an eſtate in *fee*; and inſiſted he took an *eſtate tail*. He cited 1 *Ventr.* 225. *King* verſus *Melling*. 1 *P. Williams* 664. and 1 *Leon.* 285. there cited, which he ſaid was exactly this caſe; alſo 2 *Bur.* 1,100. *Doe* on the demiſe of *Long* verſus *Laning*.

Mr. *T. Cowper contra* contended, that the clear intention of the teſtator was to give the children of *Samuel Shenton* the elder a fee; and if ſo, the words "heirs of the body" might be conſtrued to be words *of purchaſe*, or words of *limitation according to ſuch intent*: That it had been expreſsly ſo held in the caſe cited from 2 *Bur.* 1,100. which he ſaid was the only caſe he ſhould take notice of, becauſe it was exactly in point for the defendant. There the deviſe was to *M. R. and the heirs of his body* lawfully begotten, and to *their heirs and aſſigns for ever*: The court ſaid "the intention "of the teſtator was to give the children of *M. R. a fee*," and accordingly conſtrued the words *heirs of the body*, to be *words of purchaſe*. Here the words "*their heirs for ever*," plainly ſhew the teſtator meant the iſſue of *Samuel* ſhould take a fee. But another ſtrong circumſtance is, the legacy of 100 *l.* deviſed to his niece in caſe *Samuel* ſhould die without leaving iſſue. Of neceſſity, therefore, the teſtator muſt mean a dying without iſſue at *the time of his death*; for if he intended ſhe ſhould wait till *a total failure of iſſue*, ſhe might wait for an hundred years, or for ever.

Lord *Mansfield* aſked Mr. *Cowper* if he knew of any caſe, where upon a limitation of *lands*, upon a dying without iſſue, thoſe words had been confined to a dying without iſſue *living at the time of the death*. The diſtinction is, between a deviſe of lands and perſonal eſtate: in the latter caſe, the words are taken in their vulgar ſenſe; that is, *dying without leaving iſſue at the time of his death*.

1776.

DENN *ex dim.* GREENING *verſus* SHENTON.

* *Vide* Nicholſon *verſus* Hooper, 2 P. *Wms.* 299.—Target *verſus* Gaunt, 1 P. *Wms.* 432.—Pinbury *verſus* Elkin, 1 P. *Wms.* 563.—Forth *verſus* Chapman, 1 P. *Wms.* 667.

*death*. In the former, they are taken in a legal ſenſe; and that is, *whenever there is a failure of iſſue* *.

Mr. *Cowper* named no ſuch caſe, but dwelt on the abſurdity of the deviſe to "*their heirs for ever*," if the intention was not to give a fee.

Lord *Mansfield*, after ſtating the caſe, ſaid, the queſtion is, whether the grandſon took an eſtate tail, or an eſtate in fee? Now the deviſe is to *Samuel Shenton*, and the *heirs of his body*, and *their heirs for ever*. But the words "*their heirs for ever*," are *qualified* by the ſubſequent words, "in caſe he ſhall die *without* "*leaving iſſue*," which clearly ſhew it to be an eſtate tail; and then, the teſtator gives it over to the leſſor of the plaintiff. It is too clear to admit of a doubt.

The three other judges concurred.

*Per Cur. Poſtea* delivered to the plaintiff.

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*Same day.*

## REX *verſus* HART, Eſq.

MR. *Davenport* moved for directions to the Maſter to ſtrike out twenty-four of the ſpecial jury *ex parte*, in caſe the defendant and his agents ſhould omit to attend the Maſter's next appointment. The motion was founded on an affidavit of three appointments having been made, and their declining to ſtrike out *till a day ſhould be appointed for the trial*.

The ſpecial jury had been nominated in laſt term: But the twenty-four had not been ſtruck out by the parties. And the cauſe was not then tried; but was intended to be tried at the ſittings after this term. The defendant's attorney attended the Maſter's third appointment to ſtrike out, but declined doing it for the reaſon abovementioned.

Lord *Mansfield* was clear the Maſter might do it without any direction from the court; and declined giving him any in particular, but had no doubt he might do it now, juſt as if he had proceeded laſt term; and that it was right for him to act as uſual, unleſs there ſhould appear any particular reaſon to the contrary.

In the preſent caſe there had happened no change of ſheriffs: which, as Lord *Mansfield* obſerved, had been given as a reaſon why the ſame jury ſhould not ſerve for the trial of the cauſe, which had been already ſtruck for a former intended trial. But he ſaid, he did not ſee the reaſon why the change of the ſheriffs in the mean time, ſhould make any difference.

Mr.

Mr. *Wallace* said, the Court of *Common Pleas* had lately determined that it should be so, and that the change of the sheriffs makes no difference. 1776.

REX *versus* HART.

Lord *Mansfield* said, he was glad of it.

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## REX *versus* the Churchwardens of TAUNTON St. JAMES.

*Saturday, Feb.* 10th.

Return to a *mandamus* that *L. C.* was not duly *elected* sexton according to ancient *custom*; that there is a custom for the inhabitants, *&c.* to *remove* at *pleasure*, and that *L. C.* was *removed* pursuant to such *custom*, is good.

THIS was a return to a *mandamus*, directed to *John Ridge* and *Luther Trott*, churchwardens of *Taunton St. James* in *Somersetshire*, to restore *Lewis Cogan* into the place and office of sexton of the said parish.

They returned, that *Lewis Cogan* was *not*, according to the ancient custom of the said parish, *duly elected*, and sworn into the said place and office, as by the writ is supposed: and further they returned, a *custom immemorial* for the churchwardens and inhabitants paying scot, and bearing lot, or the major part of them to assemble and elect a sexton for the said parish; which person, so elected sexton, the churchwardens and inhabitants paying scot and bearing lot, or the major part of them, for that purpose assembled in vestry in the parish church, have for time beyond memory, been *used* and accustomed to *remove*; and still of right ought to remove from his said office, *at their will and pleasure*: and then they returned a discharge and *removal* of the said *Lewis Cogan* from the said office of sexton, pursuant to the custom; and, therefore, that they could not restore him.

Mr. *Alleyne* objected, that this return was bad as being inconsistent; for it shews that the sexton was *not well elected*, and yet that he was *regularly turned out*, which is repugnant; and if so though one part of the return be good, the court will award a peremptory *mandamus*: *Regina* versus *Mayor and Aldermen of Norwich*, 2 *Ld. Raym.* 1,244.

Mr. *Buller contra*: Both parts of the return are true; and they are not repugnant or inconsistent. The writ supposes he was elected according to the custom. To this it is returned, that he was *not duly elected according to the custom*. And they further shew a custom, to *remove* the sexton at *pleasure*, and that they have so removed him. This is no repugnancy: for he might be elected *in fact*, though *not duly* according to the ancient custom: and, therefore, they had a right to remove him. *Wright* versus *Fawcett*, *Easter* 7 *Geo.* 3. *B. R.* since reported in 4 *Bur.* 2,040.

Lord

1776.

REX *verſus* Churchwardens of TAUNTON St. JAMES.

Lord MANSFIELD.—I ſee no inconſiſtency or repugnancy at all. They return that *Lewis Cogan was not duly elected.* But as it was clear he had been *in poſſeſſion* of the office, whether duly elected or not, the return goes on and ſtates, "*a cuſtom* in the "pariſh to *remove* their ſexton *at pleaſure*; and that in purſu- "ance of ſuch cuſtom, and agreeably thereto, they had *actually* "*removed* him." Now where is the repugnancy of this return? If he was *not* duly elected, he certainly has no right to be reſtored. But whether duly elected or not, they ſhew a right by cuſtom to remove him at pleaſure, and that they have done ſo. There is no repugnancy in ſaying, that he was *not duly* elected, but that being *in fact* elected, they had according to an ancient cuſtom removed him from the office. In either caſe they were equally entitled to exerciſe that right. Therefore, let the return be allowed.

The three other Judges concurred.

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*Monday, Feb.* 12th.

LINDON *verſus* HOOPER.

An action for money had and received does not lie to recover back money paid for the releaſe of cattle damage feaſant, though the diſtreſs were wrongful.

UPON a rule to ſhew cauſe why a new trial ſhould not be granted in this caſe, Mr. Juſtice *Aſhhurſt* read his report as follows: This was an action for money had and received brought by the plaintiff againſt the defendant *Hooper*, who had *diſtrained* the plaintiff's cattle. The plaintiff inſiſted he had a right of common, and demanded his cattle to be reſtored, which the defendant refuſed to do, unleſs the plaintiff would pay him 20*s.* for the damage done. Upon this, the plaintiff paid the money in diſpute for the releaſe of his cattle; and the action is brought for that money. At the trial the queſtion was, whether the plaintiff was entitled to recover back the money ſo paid, by this ſpecies of action? My opinion was, that he could not; for it would be extremely inconvenient and hard if a defendant ſhould, upon his parol be obliged to come and defend himſelf againſt any right that a plaintiff might ſet up, without giving him notice; and accordingly the plaintiff was nonſuited.

Mr. *Manſfield* ſhewed cauſe, and inſiſted that an action for money had and received, was not the proper method to try *this* right. 1ſt. Becauſe upon the general iſſue, five or ſix different queſtions and matters of right might be involved, without any notice to the defendant, or intimation on the face of the record, how many and which of them were intended to be tried; or to

which

which in particular it would be neceſſary for him to apply his defence. Conſequently he might come totally unprepared; and if not, yet the law will not intend a party to be prepared, unleſs he is legally appriſed by the record of what he is to defend. 2dly. The verdict itſelf will not decide the right; but only the immediate matter in diſpute between the parties: And not even that, at any conſiderable diſtance of time. For as nothing appears on the record reſpecting the right, or even that the right itſelf came in queſtion; it might happen upon a future diſpute, even between the ſame parties, that the witneſſes might be dead, and no trace might be to be found by which it could be aſcertained how the right was determined. So that in ſuch an action, the defendant would not only be put to the greateſt difficulties in eſtabliſhing his right; but after all, the remedy, if he ſhould ſucceed, would prove inadequate. On the other hand, if *replevin* or *treſpaſs* had been brought, either of which would have been the proper action to try this queſtion; the defendant would have had full notice by the pleadings how to ſhape his defence, and the record after verdict and judgment would have been deciſive of the right. But it will perhaps be inſiſted, that though replevin or treſpaſs were open, yet the plaintiff had a right alſo to bring this action; and, therefore, was at liberty to make his election between them. But this is not like any of thoſe caſes, where a party having different remedies, may elect to ſue either. In *Moſes* v. *Macfarlan*. 2 *Bur*. 1,006. the defendant compelled the plaintiff to pay the money againſt his own expreſs agreement not to do ſo. In *Feltham* v. *Terry* *, it was the only action that could be brought. In *Aſtley* v. *Reynolds*, 2 *Str*. 915. the money was extorted from the defendant under dureſs of his goods: And no doubt, exaction or extortion of money is a good ground to ſupport an action for money had and received. In *Sadler* v. *Evans* †, the only queſtion was, whether this action lay againſt an *agent* for money received by him on account of his *principal*, and bears no ſimilitude to the preſent caſe. In Sir *Richard Newdigate* v. *Davy*. 1 Lord *Raym*. 742. there could be no other action. But none of theſe authorities come near the preſent. The queſtion here is a queſtion of *right*; and either *replevin* or *treſpaſs* would have been the proper remedy.

1776.

LINDON *verſus* HOOPER.

* *Eaſter* 13 *Geo*. 3. *B. R.*

† Since reported in 4 *Bur*. 1984.

Mr. *Morris* and Mr. *Buller*, *contra*, inſiſted, that the payment in this caſe was a *compulſory* payment on the plaintiff for the releaſe of his cattle, which had been wrongfully impounded; and, therefore,

1776.

LINDON *verſus* HOOPER.

therefore, recoverable in this action. For wherever a party demands money *without right* and by compulſion, an action for money had and received will lie, notwithſtanding there may be other actions open to the plaintiff.

But it is objected, that upon this form of action, the defendant could have no *notice*, what queſtion was to be litigated. If he had not, it was his own fault: For on the demand of the cattle by the plaintiff, he told the defendant he had a right of common. The defendant denies he had ſuch right, and inſiſts upon a ſum of money as a conſideration for the cattle being releaſed. It is, therefore, not true that the defendant had no notice; for he knew the grounds upon which he demanded the plaintiff's money; conſequently he knew what he was to defend himſelf againſt.

Objection 2d. That replevin or treſpaſs was the only proper action in this caſe.—Anſwer; the party may chuſe his action for money had and received. In *Aſtley* v. *Reynolds*, 2 *Str.* 915. detinue or trover was open to the plaintiff; yet this action was held to lie.—In *Howard* v. *Wood*, Sir *Thomas Jones* 126-7. and *Arris* v. *Stukeley*, 2 *Mod.* 260. it was held, "that "*indebitatus aſſumpſit* lies for the profits of an office:" In both thoſe caſes, every objection now made was inſiſted on and overruled by the court. The queſtion to be tried was, Whether the grant of the office was good or bad; but that did not appear from the form of the declaration; nor was it poſſible for the defendant to be appriſed what title the plaintiff intended to ſet up. Again it was not the only remedy; for an aſſize will lie for an office. Therefore, theſe authorities are expreſsly in point.

The queſtion in the preſent caſe is, Who had a right to the money? If it was the plaintiff's right the action is well brought; for an action for money had and received will lie wherever it is due *ex æquo et bono*. The very giſt of the action is, that the defendant is obliged by the ties of natural juſtice to refund the money.

In *Feltham* v. *Terry*, the court held that treſpaſs would have lain if the defendant had elected to purſue that ſpecies of remedy. The words of the court were theſe; "it is manifeſt that "the taking was tortious, and that the plaintiff might have "brought an action of treſpaſs. But we all think he may wave "the *tort*, and go for the money clearly due: And if he does, "it is a benefit to the defendant: Becauſe he can then recover "no more than in equity he is bound to receive."

In

1776.

LINDON *verſus* HOOPER.

In all the caſes cited, the objection as to want of notice was equally applicable; and ſo it muſt be in every action for money had and received. Sir *Richard Newdigate* v. *Davy*, 1 Lord *Raym.* 742. *Moſes* v. *Macfarlan*. *Aſtley* v. *Reynolds*. *Sadler* v. *Evans*. But notwithſtanding that, the fact is that this action is always moſt favourable to the defendant; for whatever defence he can ſhew to rebutt the plaintiff's title may be given in evidence on the general iſſue.

In another reſpect too this action in the preſent caſe is particularly favourable to the defendant; for he had a right to deduct any expence he might have been at on account of the cattle; which he could not have done if treſpaſs had been brought. Therefore, upon the authorities, as well as upon the reaſon and juſtice of the caſe, the plaintiff is intitled to recover in this action.

Lord *Mansfield* now ſtated the caſe from the report of Mr. Juſtice *Aſhhurſt*, from which I collected this additional circumſtance not before mentioned; namely, that the defendant agreed to return the money if the plaintiff ſhould make out his right; and then his Lordſhip proceeded to deliver the opinion of the court as follows:

The particular circumſtances of a promiſe or agreement to return the money, if the plaintiff ſhould make out his right, do not diſtinguiſh this caſe from the general queſtion: They relate to an amicable ſettlement which never took place.

The queſtion then is general; Whether the proprietor of cattle diſtrained, doing damage, who has paid money to have his cattle delivered to him, can bring an action for that money as had and received to his uſe?

Though, after the cauſe is brought before the jury, an objection to turn the plaintiff round, if the *merits* can be fully and fairly tried in the action brought, is unfavourable; yet, if founded in law, it muſt prevail. We were extremely loath to allow it without full conſideration.

The preſent caſe is ſingular, and depends upon a peculiar ſyſtem of ſtrict poſitive law.

Diſtraining cattle, doing damage, is a *ſummary execution* in the firſt inſtance. The diſtrainer muſt take care to be *formally* right; he muſt ſeize them in the act; upon the ſpot: For if they eſcape, or are driven out of the land, though after view, he cannot diſtrain them. He muſt obſerve a number of rules in relation to the impounding and manner of treating the diſtreſs.

The law has provided two preciſe remedies for the proprietor of cattle which happen to be impounded.

1776.

1st, He may replevy: And, if he does, upon the avowry, he must ſpecially ſet out a right of common, or ſome other title, as a juſtification of the cattle being where they were taken. Or,

2dly, If he does not chuſe to replevy, but is deſirous to have his cattle immediately re-delivered, he may make amends, and then bring an action of treſpaſs for taking his cattle; and particularly charge the money ſo paid by way of amends, as an aggravation of the damage occaſioned by the treſpaſs. If to ſuch an action the diſtrainer pleads that he took them doing damage, the plaintiff muſt ſpecially reply the right or title which he alleges the cattle had to be there.

If inſtead of an action of treſpaſs, an action to recover back the money ſo paid by way of amends might be brought at the election of the plaintiff; the defendant would be laid under a great difficulty. He might be ſurpriſed at the trial: He could not be prepared to make his defence; he could not tell what ſort of right of common or other juſtification the plaintiff might ſet up. The plaintiff might ſhift his preſcription as often as he pleaſed; or he might reſt upon objections to the regularity of the diſtreſs. The plaintiff can never be ſuffered to elect to throw ſuch a difficulty upon his adverſe party. Beſides, as applied to the ſubject matter of this queſtion, the action for money had and received could never anſwer the equitable end for which it was invented, and deſerves to be encouraged. For the point to be tried and determined in this action is, Whether the plaintiff's cattle treſpaſſed upon the defendant's land? That may depend upon the plaintiff's right or the defendant's right, or the fact of treſpaſſing; Or it may depend upon mere *form*. If the diſtreſs was irregular, the amends muſt be recovered back again: So that, allowing the owner of the cattle to ſubſtitute this remedy in lieu of an action of treſpaſs, would, as between the parties, be unequal and unjuſt; and upon principles of policy would produce inconvenience. It would break in upon that branch of the common and ſtatute law which relates to diſtreſſes. It would create inconvenience, by leaving rights of common open to repeated litigation, and by depriving poſterity of the benefit of preciſe judgments upon record.

As to preſcriptive rights of common, the money paid by way of amends is a *ſpecial damage*; and is always ſo alleged in the declaration of treſpaſs, which in every view is the action *peculiarly proper* for this kind of queſtion.

An

An action for money had and received is a *new experiment*. No precedent has been cited. This objection alone would not be concluſive; but upon principles of private juſtice and public convenience, we think the method of proceeding uſed and approved for ages, in the caſe of diſtreſſes, ought to be adhered to. 1776. Lewiſon, *qui tam* Hooper.

There is a material diſtinction between this and the inſtances alluded to at the bar, where the plaintiff is allowed to *wave* the *treſpaſs*, and bring the action for *money had and received*. In *thoſe* inſtances, the relief is more favourable to the defendant. He is liable only to refund what he has actually received, contrary to conſcience and equity. In *this*, informalities, in taking or treating the diſtreſs, would avoid the amends, though the defendant had a right to diſtrain. But, which is more material, in *thoſe* inſtances, the plaintiff, by electing this mode of action, eaſes the defendant of *ſpecial pleading*, and takes the riſk of being ſurpriſed upon himſelf. In *this*, he eaſes himſelf of the difficulty and preciſion of ſpecial pleading, and the burthen of proof conſequent thereupon; and expoſes the defendant to uncertainty and ſurpriſe.

The caſe of *Feltham* verſus *Terry*, *Paſch.* 13 *Geo.* 3. *B. R.* relied on in the argument, was a caſe of goods taken in execution, and ſold under a warrant of diſtreſs upon a conviction. The conviction was quaſhed, conſequently there could be no juſtification. The plaintiff, by bringing his action for money had and received, could only recover the money for which the goods were ſold. But, if treſpaſs had been brought, the defendant muſt have pleaded ſpecially, and the plaintiff might have recovered damages far beyond the money actually received from the ſale of the goods. So, where goods are taken in execution, which are not the property of the perſons againſt whom execution is taken out; the owner may wave the treſpaſs, and bring his action for the amount of the money which the goods ſold for.

We think this caſe not within the *reaſon* of any, in which, hitherto, the plaintiff has been allowed to wave the *treſpaſs*, and bring this action.—We think, to allow it, would not tend to the furtherance of liberal juſtice, but would be a prejudice to the defendant, and in a public view, inconvenient. Therefore, we agree that the plaintiff was rightly nonſuited at the trial.

*Per Cur.* Rule for a new trial diſcharged.

THE END OF HILARY TERM.

THE END OF THE FIRST VOLUME.

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## ERRATA.

*Page* 318. line 27. *after* do *leave out* no
354. — 17. *for* ſhews *read* ſhew
371. — 20. for *ab libitum* read *ad libitum*
384. — 36. *for* ſtatutes *read* ſtatute
433. — 6. *for* plaintiff *read* plaintiffs
436. — 11. *for* objection *read* object
443. — 3 *from bottom, for* have *read* has
459. — 23. *after* in *inſert* a
478. — 7. *for* may *read* might
508. — 33. *for* the *read* they
550. — 25. *marg. for* where *read* were
562. — 2. *for* o her *read* other
805. — 10. *for* plaintiff *read* defendant
826. — 3 *from bottom, after* engine *inſert* a comma.

# PREFACE

TO

## *THE FIRST EDITION.*

TO begin, where ſo many examples teach us rather to end; to ſubmit the early labours of youth to a tribunal, from which ſome of the higheſt judicial characters have withheld the fruits of their experience, certainly appears to border upon imprudence, not to ſay, upon arrogance.

Senſible of the truth of this obſervation, it is with the utmoſt diffidence that I preſume to lay the following Work before the profeſſion: conſcious that it can deſerve little praiſe, and *barely* indulging a hope, that the anxiety I have felt in compiling it, may not be juſtified by an unfavourable reception, both by the bench and bar. If I have ever flattered myſelf with more than this, it has been from the encouragement of thoſe who firſt emboldened me to attempt ſo arduous an undertaking, and whoſe countenance has ſince induced me to perſevere.

Before I proceed to ſtate the plan I have purſued, it is but gratitude to the memory of the late Sir *James Burrow*, as well as a gratification to my own feelings, to acknowledge how much I am indebted to him for the peruſal of his papers, which, without any previous acquaintance, he offered, in the moſt obliging manner, to my uſe.

It is next to impoſſible, where there is a diverſity of opinions, to fix upon any plan that will be entirely free from objection: And there is, perhaps, no ſubject about which the profeſſion differ more, than the proper method

of reporting. It is almoſt of neceſſity therefore, that every one who engages *in this ſpecies of publication*, is left to his own choice. My great object has been, not to ſwell the work by unneceſſary length of pleading, or by a detail of the arguments delivered by counſel on each ſide: But to ſtate the former as concifely, and to give the ſcope of the latter (one or two inſtances excepted), in as comprehenſive a manner, as the nature and importance of the ſubject would admit. Every omiſſion, therefore, muſt be laid to my charge alone; whilſt, on the other hand, it would be more than preſumption in me to ſuppoſe that any arrangement I have made of the ſubject matter, can do juſtice to the ingenuity and ability of thoſe who furniſhed it.

With reſpect to the judgment of the Court, I have endeavoured to be as faithful, accurate, and full, as the aſſiſtance of ſhort hand, and the moſt earneſt attention, could enable me to be. I would by no means, however, be underſtood to profeſs, that I have given more than the ſubſtance of what fell from the bench. If I have in any degree ſucceeded in doing that, ſo as not to incur their cenſure, I ſhall be more than recompenſed for the toil and anxiety neceſſarily attendant on ſuch an undertaking.

In a compilation of this ſort, in which a variety of legal topics have been nicely diſcriminated, and copiouſly diſcuſſed, it is impoſſible but that ſome miſtakes muſt occur to attentive and judicious obſervation: Yet, I truſt ſuch errors will be found to be trivial, or, at leaſt will appear ſo to the candour and liberality of the profeſſion, if the work ſhould be thought to deſerve a general character of authenticity.

# REPORTS

OF

# CASES

ADJUDGED IN THE

# Court of King's Bench:

FROM

*HILARY TERM, the 14th of GEORGE III.* 1774,

TO

*TRINITY TERM, the 18th of GEORGE III.* 1778.

Both Inclusive.

By HENRY COWPER, Esq.

BARRISTER AT LAW, OF THE MIDDLE TEMPLE.

*SECOND EDITION;*

IN TWO VOLUMES.

VOL. I.

LONDON:

PRINTED BY A. STRAHAN,

LAW-PRINTER TO THE KING'S MOST EXCELLENT MAJESTY,

FOR E. AND R. BROOKE AND J. RIDER, BELL-YARD, TEMPLE-BAR.

1800.